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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 390

INEZ M. JAMISON, WILLIAM N. DYKMAN, AND MARTIN E. GOETZINGER, EXECUTRIX AND EXECUTORS OF WILLIAM A. JAMISON, DECEASED, PETITIONERS,

vs.

VALENTIN ENCARNACION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,521)

(34,521)

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1

COURT OF APPEALS

OF THE STATE OF NEW YORK.

VALENTIN ENCARNACION,
Plaintiff-Appellant,

against

2

WILLIAM A. JAMISON and CHRISTINA ARBUCKLE, doing business under the firm name and style of Arbuckle Brothers,

Defendants,

WILLIAM A. JAMISON,
Defendant-Respondent.

Statement Under the Rule.

3

The above entitled action was commenced by the service of the summons on defendant, William A. Jamison, on the 20th day of November, 1925.

The answer of the defendant was served on the 16th day of March, 1926.

The plaintiff's attorneys are Miele & Castellano, Francis A. Castellano, Jr., Esq., of counsel.

The defendant's attorney is James B. Henney, Charles G. Hill, Esq., of counsel.

This action was tried before Hon. Harry E. Lewis and a jury on the 9th day of March, 1928, and the jury rendered a verdict for plaintiff.

4 *Statement Under the Rule.*

Motion to set aside the verdict and for a new trial was denied.

The defendant's notice of appeal was filed the 30th day of March, 1928, and served the 31st day of March, 1928.

Upon appeal by the defendant to the Appellate Division, the judgment rendered upon said verdict was unanimously reversed upon the law and the facts, and the complaint dismissed.

Judgment of reversal and dismissing the complaint was entered in the office of the Clerk of
5 Kings County on July 16th, 1928.

Plaintiff's notice of appeal to the Court of Appeals was filed September 5th, 1928, in the office of the Clerk of the County of Kings, and was served on September 12th, 1928.

6

7

Notice of Appeal to Appellate Division.

SUPREME COURT,

KINGS COUNTY.

VALENTIN ENCARNACION,

Plaintiff,

against

WILLIAM A. JAMISON and CHRISTINA ARBUCKLE, doing business under the firm name and style of Arbuckle Brothers, 8

Defendants.

Sirs:

PLEASE TAKE NOTICE that the defendant, William A. Jamison, hereby appeals to the Appellate Division of the Supreme Court, in and for the Second Judicial Department, from the judgment entered herein in the office of the Clerk of the County of Kings, on the 15th day of March, 1928, in favor of the plaintiff and against the defendant, 9 William A. Jamison, in the sum of $2,638.05, and from each and every part of said judgment, both upon the law and the facts.

Dated, New York, March 29th, 1928.

Yours, &c.,

JAMES B. HENNEY,
Attorney for Defendant,
William A. Jamison,
100 William Street,
Borough of Manhattan,
City of New York.

10 *Summons.*

To:
MIELE & CASTELLANO, Esqs.,
Attorneys for Plaintiff,
299 Broadway,
Borough of Manhattan,
City of New York.

WILLIAM E. KELLY, Esq.,
Clerk, Supreme Court,
Kings County.

11

Summons.

SUPREME COURT,

KINGS COUNTY.

[SAME TITLE.]

To the above-named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with
12 this summons, to serve a notice of appearance, on the plaintiff's attorneys within twenty days after the service of this summons exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated October 20th, 1925.

MIELE & CASTELLANO,
Attorneys for Plaintiff,
Office and Post Office Address,
299 Broadway,
Borough of Manhattan,
New York City.

13

Complaint.

SUPREME COURT,

KINGS COUNTY.

[SAME TITLE.]

Plaintiff, by Miele & Castellano, his attorneys, complaining of the defendants, says:

14

First: At all the times hereinafter mentioned, the above defendants were and they now are co-partners in business in the City of New York, under the firm name and style of Arbuckle Brothers.

Second: At all the times hereinafter mentioned, plaintiff was in the employ of defendants as a laborer or stevedore.

Third: On or about the 19th day of May, 1925, while plaintiff was at work as an employee for said defendants and engaged in their service on

15

a certain barge then lying in navigable water off the Jay Street Terminal, in the Borough of Brooklyn, where defendants have their place of business, without right or just cause the said defendants and their foreman or superintendent, who was delegated by defendant to give orders to plaintiff and his fellow-workers while working on said barge, committed a grievous assault and battery upon this plaintiff, by punching plaintiff about the head, face and body, knocking and throwing him to the ground and then kicking him about the head and face, and in otherwise admin-

16 *Complaint.*

istering to plaintiff severe punishment, and by reason thereof plaintiff sustained a fracture and other injury of the skull and other serious and permanent injuries to and about his head, face and body, compelling his removal to a hospital, and since said date plaintiff has been and he now continues to be under medical treatment and attention for his said injuries and wholly disabled from working and performing any services, thereby sustaining a large loss in wages.

17 Fourth: Plaintiff has sustained permanent injuries which will permanently cause him pain and disturbance and affect his ability to earn a living, and by reason of the premises plaintiff has sustained damage in the sum of $25,000.

WHEREFORE, plaintiff demands judgment for the sum of $25,000 damages and costs.

MIELE & CASTELLANO,
Attorneys for Plaintiff,
299 Broadway,
Manhattan, New York City.

18 (Verified 2/5/26 by Valentin Encarnacion.)

19

Answer.

SUPREME COURT,

KINGS COUNTY.

[SAME TITLE.]

Defendant, William A. Jamison, answering the complaint of the plaintiff herein:

Denies upon information and belief each and every allegation contained in the paragraphs thereof designated "Second", "Third" and "Fourth". 20

WHEREFORE, defendant demands judgment dismissing the complaint herein, with costs.

JAMES B. HENNEY,
Attorney for Defendant,
William A. Jamison,
100 William Street,
Borough of Manhattan,
City of New York.

(Verified 3/11/26 by William A. Jamison.) 21

22

Bill of Particulars.

SUPREME COURT,

KINGS COUNTY.

[SAME TITLE.]

Plaintiff for his bill of particulars alleges and states:

23 1. The accident occurred on the 19th day of May, 1925, at about 11:30 A. M.

2. Plaintiff was at work and working on barge "No. 3".

3. Barge "No. 3" was then lying in navigable water off the Jay Street Terminal in the Borough of Brooklyn.

4. The foreman or superintendent who committed the assault and battery was a person by the name of Frank, surname unknown to plaintiff. He was foreman of the gang; a man weighing
24 about 140 pounds, of fair complexion, between the age of 25 and 30 years.

5. Plaintiff sustained a fracture and other injuries of base of skull in and about the left frontal region, including intracranial injuries. Because of the said injuries plaintiff has consistent hemorrhages from the nose and ears; because of the aforesaid, plaintiff is subjected to spells of dizziness and loss of hearing. Plaintiff also sustained internal injuries about the face and jaw, causing excessive discomfort.

Bill of Particulars.

6. Plaintiff was confined to the Cumberland Street Hospital, Auburn Place, in the Borough of Brooklyn, for a period of eight (8) days, from May 19th, 1925, to May 27th, 1925.

7. Plaintiff expended One hundred and fifty ($150) Dollars for medical aid and assistance, including medicines and X-ray photos.

8. Plaintiff's usual occupation is that of stevedore; he earns 41c. per hour and works ten (10) hours a day. Plaintiff was unable to attend to his usual vocation for a period of one year, at the rate of Twenty-four and 60/100 ($24.60) Dollars per week.

Dated, New York, March 2nd, 1928.

MIELE & CASTELLANO,
Attorneys for Plaintiff,
Office & P. O. Address,
299 Broadway,
Borough of Manhattan,
New York City.

To:

JAMES B. HENNEY, ESQ.,
Attorney for Defendants,
100 William Street,
Borough of Manhattan,
New York City.

(Verified 3/1/28 by Valentin Encarnacion.)

28

Letter Amending Bill of Particulars.

MIELE & CASTELLANO

COUNSELLORS AT LAW

299 Broadway

New York

Stefano Miele
F. A. Castellano, Jr.

Phone
Worth 3834

March 5th, 1928.

29

James B. Henney, Esq.,
100 William Street,
New York City.

Attention—Mr. Allen M. Taylor.

Dear Mr. Taylor:

Re: Encarnacion *v.* Arbuckle Bros.

Pursuant to our telephone conversation I am sending you a stateemnt of the injuries the plaintiff claims to be permanent; they are as follows:

Fracture of the skull and resultant pressure on the brain.

30

Dizziness, loss of hearing and hemorrhages of the nose.

It is agreed that the motion to preclude returnable March 6th, 1928, in the above case is discontinued.

Hoping this information is sufficient we remain,

Very truly yours,

MIELE & CASTELLANO,
by ALFRED C. DITOLLA.

ACD:CS

31

Extract from Minutes.

At a Trial Term of the Supreme Court of the State of New York, held in and for Kings County, at the Court House in the Borough of Brooklyn, on the 9th day of March, 1928.

Present—Hon. Harry E. Lewis, *Justice.*
Calendar No. 9664—Part 8.

32

[Same Title.]

This cause having been called for trial in its order on the Calendar, and twelve trial Jurors having been duly drawn, empanelled and sworn to try the same, the Jury come into Court and say that they find a verdict for the plaintiff in the sum of Twenty-five hundred ($2500.00) Dollars.

The defendants' counsel moves to set aside the verdict and for a new trial on the ground that the verdict is against the law, the evidence, the weight of the evidence and upon the provisions set forth in Section 549 of the Civil Practice Act. Motion denied. Thirty (30) days' stay of execution after service of notice of entry of judgment to the defendant.

33

A true extract from the minutes.

William E. Kelly,
Clerk.

Frank M. Rooney,
Special Deputy Clerk, Part 8.

34

Judgment.

SUPREME COURT,

KINGS COUNTY.

[SAME TITLE.]

The above entitled action having been duly tried before Mr. Justice Harry E. Lewis and a jury, at Part VIII of the New York Supreme Court, held
35 in and for the County of Kings, at the County Court House therein, on the 9th day of March, 1928, and the jury having duly rendered a verdict in favor of the plaintiff and against the defendant in the sum of Twenty-five hundred ($2500) Dollars and the costs of the plaintiff having been duly taxed in the sum of $138.05 Dollars, it is

Now on motion of Miele & Castellano, attorneys for the plaintiff, it is

ADJUDGED that the plaintiff Valentin Encarnacion, do recover of the defendants William A. Jamison and Christina Arbuckle, doing business
36 under the firm name and style of Arbuckle Brothers, the sum of Twenty-five hundred ($2500) Dollars, together with the sum of $138.05 Dollars costs, as taxed, making in all the sum of $2638.05 Dollars, and that the plaintiff have execution therefor.

Dated, New York, March 15, 1928.

WILLIAM E. KELLY,
Clerk.

37

Case.

NEW YORK SUPREME COURT,

KINGS COUNTY.

TRIAL TERM—PART 8.

[SAME TITLE.]

Brooklyn, March 9, 1928.

38

Before—HON. HARRY E. LEWIS, *Justice*, and a Jury.

APPEARANCES:

FRANCIS A. CASTELLANO, ESQ., for the Plaintiff.

CHARLES G. HILL, ESQ., for the Defendant.

(A jury is duly impanelled and sworn.)

(Mr. Castellano made an opening statement to the jury on behalf of the plaintiff.)

(Mr. Hill made an opening statement to the jury on behalf of the defendant.) 39

VALENTIN ENCARNACION, the plaintiff, 92 Washington Street, Brooklyn, called as a witness in his own behalf, being duly sworn, testifies as follows:

Direct examination by Mr. Castellano:

Q. Is that 92 Washington Street, Brooklyn? A. Yes.

40 *Valentin Encarnacion—Plaintiff—Direct.*

Q. You were born in Porto Rico, were you? A. Yes, sir.

Q. How old are you? A. About thirty years.

Q. On the 19th day of May, 1925, for whom did you work? A. Jay Street Terminal.

By the Court:

Q. What was the name of the firm you worked for there? (No answer.)

41 *By Mr. Castellano:*

Q. For whom did you work? Arbuckle Brothers?

The Court: Is that admitted?

Mr. Hill: Yes.

By Mr. Castellano:

Q. And how long had you worked for the same firm of Arbuckle Brothers in May, 1925; how may years? A. Five years.

Q. And on May 19th how much were you making a day or a week? A. $24.60 a week.

42 Q. And what was your duty? What did you do for Arbuckle Brothers? A. Stevedore.

Q. That is you loaded and unloaded barges? A. Loaded everything.

Q. On May 19, 1925, were you working on barge "No. 3"? A. Yes.

Q. And was that barge in the river? A. Yes, sir.

Q. At the foot of Jay Street, Brooklyn? A. Yes.

Q. And when did you start to work on that day? A. Seven o'clock in the morning.

Q. And who was your foreman on that day? A. Frank.

Q. And how long had he been foreman before that day? A. Five or six months.

Q. Did he do any work? A. No, sir.

Q. About how many were in your gang, working like you? A. Twelve or thirteen men.

Q. And who gave orders to the twelve or thirteen men? Who told you where to go to work and what work to do? A. Frank.

Q. And was Frank there as your foreman since seven o'clock in the morning, too? A. Yes; seven o'clock the superintendent, and then it was Frank.

Q. First the superintendent, and then he 44
brought Frank? A. Yes.

Q. How long was Frank working on May 19, 1925? A. Five or six months.

Q. On that day did he start to work with you at seven o'clock in the morning? A. Yes.

Q. About eleven o'clock or half-past eleven in the morning what happened? A. I worked, and he come and hollered to me and called me some name.

Q. What kind of work were you doing? A. Stevedore.

Q. What kind of stevedoring work were you 45
doing? A. Everything.

Q. Were you loading or unloading barges? A. Loading barges.

By the Court:

Q. What did he say? A. He called me and said, "Hurry up, you black bastard son-of-a-bitch."

By Mr. Castellano:

Q. And what did you say to him? A. I said, "Leave me alone today. I am here for four or

five years and I can do the work and I know what work to do."

Q. And what did he say then? A. He give me a punch and I fall down.

Q. Where did he punch you? A. Right in my eyes.

Q. Right over your eyes? A. Yes, sir.

Q. Which eye? A. Right here (indicating) and I fall down to the floor.

Q. Which arm did he punch you with, the left or the right arm? A. With the right arm.

47

By the Court:

Q. Were you paid so much an hour? A. Forty-one cents an hour.

By Mr. Castellano:

Q. When he punched you on the eye what happened to you? A. I fall down.

Q. And did you get up right away? A. I can't till half-past one.

By the Court:

48

Q. What time was it when he hit you? A. Half-past eleven.

By Mr. Castellano:

Q. And when you woke up at half past one or got up at half past one, where did you find yourself, where were you? A. Somebody take me to the doctor and the doctor take me to the hospital.

Q. Where was this first doctor? A. The doctor of the company.

Q. Was he in the employ of the company, at the foot of Jay Street? A. He belong to the company.

Q. Do you know the name of this company's doctor? A. I don't know the name.

Q. Where did you have to go to this doctor? A. To the hospital.

Q. Before you went to the hospital, you said you went to the company doctor. Where is the company doctor? Where was he at the time when you fell down? A. In a new building.

Q. How many blocks is this new building where the doctor of the company was? A. He sent me 50 to the hospital.

Q. How did you go to the hospital from Arbuckle Brothers' place of business? How did you go there? In an automobile, or did you walk? A. In an automobile, in a taxi.

Q. Who called the automobile for you? A. The bookkeeper.

Q. The bookkeeper of Arbuckle Brothers? A. Yes.

Q. And when you went to the hospital, do you remember the name of the hospital, the Cumberland Street Hospital? A. I don't know. 51

Q. How long did you stay in the hospital? A. Eight days.

Q. And during the eight days that you were in the hospital, did the hospital take pictures of your head, X-rays? A. I can't tell you. I felt crazy.

Q. You don't know what happened in the hospital? A. No.

Q. But you stayed there eight days? A. Yes.

Q. Did you have any bleeding from your ears or from any place, or your nose? A. Nose and mouth and everything, the right ear.

52 *Valentin Encarnacion—Plaintiff—Direct.*

Q. How long did you bleed from the nose and mouth and right ear? A. For six months.

Q. For six months you bled. From what part of your body, where did the blood come from? A. From my nose and my right ear.

Q. How often? Did the blood come out of your nose and right ear for six months every day or every week? A. Every day.

Q. What else did you feel in your head after the accident, or after this day when you were struck in the face? A. Before?

53 Q. After Frank hit you in the face, what did you feel in your head? A. I feel nothing in my head.

Q. Did you feel any pain? A. Before, nothing.

Q. I mean after. A. After I got a pain in my head, pain here (indicating), in the forehead, and I can't open my mouth good.

Q. How many times did Frank punch you? A. I don't know. I was on the floor and I don't know no more.

Q. You did not know after you fell down what happened to you? A. No, I didn't know.

54 Q. Do you have any bother from your ears or your head now, today? Do you have any trouble with your head or ears now? A. Yes.

Q. What trouble do you have? A. The doctor said I have a fracture in my head.

The Court: Strike it out.

By the Court:

Q. How do you feel? A. I feel sick, something in my head (indicating).

Q. You have pains up in the forehead? A. Yes.

Q. Do you have pains on the side? A. Yes.

55

Q. How about the ears? A. I can't hear good.

By Mr. Castellano:

Q. How about your hearing, can you hear better with your left ear than the right? A. Yes.

Q. You can hear from the left ear but not from the right ear? A. (No answer.)

Q. Close up your left ear.

The Court: No, we will not have any such test.

56

By Mr. Castellano:

Q. Before May 19, 1925, could you hear all right? A. Yes.

Q. Were you ever sick before May 19, 1925? A. No, sir.

Q. Did you work every day for four and a half to five years for Arbuckle Brothers? A. Yes.

Q. Every day? A. Every day.

Q. Never sick? A. No.

Q. Since May 19, 1925, have you done any work? A. No, sir.

57

By the Court:

Q. No work at all? A. No.

Q. Did you work any place? A. No.

By Mr. Castellano:

Q. Did you do any work after? A. No.

By the Court:

Q. Didn't you work last year? A. No.

58 Q. Didn't you work last week? A. No.
Q. Two months ago? A. No.
Q. A year ago? A. I don't work.
Q. How long is it since you have been out of work? A. One and a half years.
Q. Didn't you work after May, 1925? A. No.
Q. Not a day? A. No.
Q. Whom do you live with? A. (No answer.)

By Mr. Castellano:

59 Q. Where do you live? A. Washington street.
Q. With whom? With your sister, brother or whom? A. With my brother.
Q. And does he support you? A. Yes.

By the Court:

Q. Does he give you money? A. Yes.

By Mr. Castellano:

Q. You are sure you did not do any work since Frank hit you? A. Yes.
Q. You never went back to work any more? A.
60 No.
Q. Did you try to go back to work for somebody? A. Yes, and I am sick.
Q. What do you mean, you are sick? A. I got something wrong with my nose.
Q. The blood comes from your nose? A. Yes.
Q. Does it still come out of your nose every day? A. Yes.
Q. And when was the last time any blood came from your ear? A. About six months ago.
Q. You have been under the treatment of a doc-

tor after you were discharged from the hospital? A. Yes.

Q. And what is the name of the doctor? A. Cestaros.

Q. And did Dr. Cestaros make some pictures of your head, some X-rays? A. Yes.

Q. How long did you have Dr. Cestaros taking care of you? A. A long time.

Q. Since you came from the country? A. He sent me to the country two months or three months.

62

Q. For two or three months you went to the hospital? A. Yes.

Q. The clinic?

The Court: You are going to have the doctor here?

Mr. Castellano: We are going to have the doctor here.

Cross examination by Mr. Hill:

Q. I understand you to say you have never done a day's work since the time of this accident; is that correct? A. (No answer.)

63

By the Court:

Q. No work since the accident? A. No, sir.

By Mr. Hill:

Q. Are you single or married? A. Married.

Q. Have you got any children? A. In my own country, yes.

Q. You mean down in Porto Rico? A. Yes.

64 *Valentin Encarnacion—Plaintiff—Cross.*

Q. And how many are there? A. Two.

Q. How old are they? A. (No answer.)

By the Court:

Q. Don't you know how old your children are? Are they big or small? A. Small.

Q. Two years, five years, seven years? A. About five years.

Q. They are not both five years, are they? A. No.

65 Q. Is one older than the other? A. (No answer.)

By Mr. Hill:

Q. Whom are they living with? A. (No answer.)

By the Court:

Q. Is your wife in Porto Rico? A. Yes.

Q. Are your children with her? A. Some family over there.

66 *By Mr. Hill:*

Q. Your wife is living here in Brooklyn with you, is she not? A. No.

Q. Where is she? A. In my country.

Q. You say your brother has been supporting you ever since the time of the accident? A. (No answer.)

The Court: He does not understand you at all.

67

By the Court:

Q. Does your brother give you money to live? A. Yes.

By Mr. Hill:

Q. How much does he give you? How many dollars does he give you a week? A. (No answer.)

By the Court:

68

Q. How much money does he give you every week? A. Sometimes $5 and sometimes $8.

By Mr. Hill:

Q. How much does he make a week? A. $25.

Q. Is he married? A. No.

Q. You and your brother live together alone? A. Yes.

Q. This doctor, Dr. Cesteros, when did you first see Dr. Cesteros? A. I can't tell you, I don't remember; a long time.

69

Q. When did you first see him? How long after you came out of the hospital did you go to see him? A. I can't tell you.

Q. Do you know whether it was one month or six months? A. More than eight months.

Q. When you first saw Dr. Cesteros, was that eight months after the accident? A. Yes.

Mr. Castellano: My doctor promised to be here, but he is not here yet. If your Honor will permit me, I will rest with the

70 *Motion to Dismiss the Complaint.*

exception of the doctor, and I will ask your Honor for permission to call him when he comes in.

The Court: Yes, you may call him at any time.

Mr. Hill: I move to dismiss on the ground that it appears, by the plaintiff's own testimony, that the act committed was that of a fellow-servant acting without the scope of his employment.

The Court: Motion denied.

71 Mr. Hill: Exception.

FRANK CURREN, residing at 229 Concord Street, Brooklyn, called as a witness in behalf of the defendant, being duly sworn, testifies as follows:

Direct examination by Mr. Hill:

Q. You are not now employed by Arbuckle Brothers are you? A. Not now.

Q. What is your work at the present time? A.
72 Chauffeur.

Q. For whom? A. Rossow.

Q. You are not connected with Arbuckle Brothers in any way? A. No.

Q. You were not in the room when the plaintiff was on the stand? A. No, sir.

Q. You are the man that had the trouble with him at the foot of Jay Street in May—May 19, 1925? A. Yes.

Q. What time did you go to work that morning? A. Seven o'clock.

Q. Were you employed by Arbuckle Brothers? A. Yes.

Q. As what? A. Taking charge of a gang.

By the Court:

Q. And the plaintiff was in your gang? A. Yes.

By Mr. Hill:

Q. What was your usual duty? A. Well, I was helping out and taking care of the gang and telling them what to do.

Q. Was that your regular work? A. Yes.

74

By the Court:

Q. You are supposed to keep them busy all the time? A. Yes.

Q. And see that they do not loaf? A. Yes.

By Mr. Hill:

Q. What were you being paid? A. The same thing, 41 cents an hour.

Q. And those were the laborers' wages? A. Yes.

Q. And you sometimes acted as a laborer? A. Yes. 75

Q. And sometimes bossed the gang? A. Yes.

Q. When you first started to work this morning at seven o'clock, did you start in bossing the gang or were you working that morning? A. Started in taking charge of the gang.

Q. Tell us your version of the trouble between you and the plaintiff.

The Court: Tell us all that happened.

The Witness: It was about twenty of

twelve, I was outside where they was loading hand trucks, was not inside of a boat, and Valentine was there talking to some other one of the laborers and I told him there was only a few more hand trucks left and to go ahead, and he started calling me names.

By the Court:

Q. You told him to go ahead with his work, and
77 what did he call you? A. I don't like to——

Q. Go ahead. A. He said, "You dirty cocksucker, get out of the way."

Q. He said it just like that? A. Yes, and I said "I am not going to get out of the way," and I said, "I am going to punch you in the nose," and he made a kick for my testicles, and he kicked me in the leg.

By the Court:

Q. You said that before you punched him? A. Yes, and after that he had a hook in his hand and
78 he wanted to hit me with the hook.

By Mr. Hill:

Q. What kind of a hook was that? A. A longshoreman hook, and I grabbed the hook and he got his finger on my mouth and around the lip, and we struggled for a while, and finally I got away from that grip and he got his fingers and tried to tear my eye out, so after that I hit him and he went down.

Q. How often did you strike him? A. Once.

Cross examination by Mr. Castellano:

Q. What is your first name? A. Frank.

Q. And on this day, the 19th of May, 1925, how long had you been foreman of Arbuckle Brothers? A. I worked off and on for about four years.

Q. But steadily before this happened, how long? A. About seven months.

Q. Your gang consisted of how many men on the day of this trouble? A. About sixteen, twenty sometimes.

Q. And were they mostly Spaniards and Porto 80
Ricans? A. Spaniards and white fellows.

Q. Were the white fellows Porto Ricans? A. Porto Ricans and American people.

Q. How many Americans did you have in that gang? A. It is according.

Q. This particular day. A. Sixteen men, I think.

By the Court:

Q. How many Americans were there in that gang? A. Three or four. The rest is Spanish.

Q. And Porto Ricans? A. And Porto Ricans. 81

By Mr. Castellano:

Q. You knew how these men were paid, didn't you? A. Yes.

Q. So much per hour? A. Yes.

Q. And it was part of your business to get as much labor from them as possible every hour? A. No, sir. They have to keep on moving.

By the Court:

Q. You wanted to see that they moved according to what you thought was the right speed? A. Yes.

82 *Frank Curren—for Defendant—Cross.*

By Mr. Castellano:

Q. When you went over to talk to Encarnacion, when he was talking to some friend, just what did you say to him? A. I said, "Twenty minutes to twelve and we want to get this pile of freight. It was not much, about five or ten minutes' work, and the quicker we get done the quicker we get out and eat." And he tried to chase me away and called me names.

83 *By the Court:*

Q. Did you tell it to him just that way, the way you are telling it now? A. That is the way I talked to him, and he told me, "What are you doing here?" he said, "your place is outside there, you cock-sucker, you white Prick, I will make you suck my prick."

By Mr. Castellano:

Q. And what did you say when he said all that? A. I tried to pick up the freight, do it myself, because it was only five or ten minutes' work, and I
84 could have did it myself instead of him arguing with me.

Q. If it had not been for the fact that he refused to go back to work, you would not have said anything to him over those names? A. No, sir.

Q. Is it not a fact they were loading this barge and not unloading it? A. Loading.

Q. You say they were taking away some trucks? A. Loading from the pier and bringing freight inside of the barge, and he was loading inside of the barge, loading the barge up.

Frank Curren—for Defendant—Cross. 85

Q. Were you ever a pugilist? A. No, sir.

Q. Did you ever fight for a living? A. No, sir.

Q. You know how to box, don't you? A. No, sir.

Q. And take care of yourself? A. Oh, I could handle myself.

Q. What part of Brooklyn do you come from?

The Court: What difference does it make?

By Mr. Castellano:

Q. What other work did you do beside steve- 86
doring and foreman? A. Driving a truck.

Q. Anything else? A. No, sir.

Q. For whom did you drive a truck? A. Rockwood, Roulston, Interstate.

Q. You mean an automobile truck for Roulston? A. Yes.

Q. Were you ever anything else besides a chauffeur and a foreman? A. No, sir.

Q. Is it true that after you hit Encarnacion, he fell to the floor of the barge and did not wake up for two hours? A. No, sir.

87

By the Court:

Q. How long did he lie there? A. About ten minutes.

Q. Then where did you take him to? A. I don't take him. Mr. Jones take him to the doctor. They laid him on the bags and as he come to and raised his eyes, he started to call me names, the same thing all over again and called me all kinds of——

The Court: Never mind. Go ahead.

88 *Frank Curren—for Defendant—Re-direct.*

By Mr. Castellano:

Q. You saw him lie there ten minutes? A. Twenty minutes the most.

Q. And during those twenty minutes, he was having a peaceful sleep, was he not? A. Yes.

Q. When he woke up, he was in the doctor's office of the Arbuckle Company, was he not? A. He woke up on top of the bags inside of the barge.

Q. And he was taken to the doctor of the Arbuckle Company? A. Yes.

89 Q. And the Arbuckle Company doctor suggested that he be removed to a hospital? A. I don't know nothing about that.

Q. Anyway he was taken in an automobile by the Arbuckle people to a hospital? A. I don't know anything about that, either.

Q. You know he stayed eight days in a hospital, don't you? A. No, sir.

Q. You knew he had been working there some four and a half to five years for the Arbuckle people? A. Yes.

Q. Steadily employed by them? A. No, sir.

90

Mr. Castellano: That's all.

Re-direct examination by Mr. Hill:

Q. When you say he was not steadily employed, how was he employed there? A. He was under Mr. Kennedy and he let him go for a while, and when he was short of men, take him back again.

Q. How long had he been working there, about? A. I couldn't say. He was working as long as I could say, seven months right along.

91

LOUIS OSBORNE, residing at 375 64th Street, Brooklyn, called as a witness in behalf of the defendant, being duly sworn, testifies as follows:

Direct examination by Mr. Hill:

Q. What is your business, Mr. Osborne? A. At the present time I am an inspector for the War Department.

Q. You saw the occurrence between Valentin and Curren? A. I was present at the time it happened.

Q. At that time, where were you employed? A. 92
I was a checker for the Southern Pacific Company at that time.

Q. Have you ever been employed by Arbuckle Brothers? A. No.

Q. Have you ever had any connection with them or any of their offices? A. No connection whatsoever.

Q. Where were you at the time of this fracas? A. I was in charge of checking freight, that was loaded on the barge at that time.

Q. And you saw the occurrence from beginning to end? A. I was busy working——

Q. Tell us what you saw about it. A. As I was 93
working there, I seen him come in the boat, they started an argument and I heard there was some names being called.

Q. Did you hear the names that were being called? A. Various names being called.

Q. Who was doing the calling? A. They were both calling one another as far as I could make out.

Q. You don't know which one started it then? A. I did not pay much attention, I was busy. The gang was sixteen men, I had to catch the marks

and numbers on those cases and bundles that come in on the boat. I heard them arguing, there is always argument down there. It is a regular everyday occurrence, and I didn't pay much attention to it, and when it started to wind up in a fight——

Q. Did you see the beginning of the fight? A. When I saw them striking blows, I started to pay a little attention to them.

By the Court:

Q. Just before the first blow was struck, did you see what was done? A. I didn't pay much attention to the argument.

Q. The first thing you know, you saw them fighting? A. When they were fighting.

By Mr. Hill:

Q. What was Valentin doing? A. He was tiering the freight in a boat, piling it up.

By the Court:

Q. Did you see him talking there? A. He didn't do much talking.

By Mr. Hill:

Q. Did he do any? A. He tried his best, but he didn't have much chance.

By the Court:

Q. How many men were there in the gang, about sixteen? A. They were coming in and out

of the boat at the time. They were not there all in the boat at the same time.

Cross examination by Mr. Castellano:

Q. Did you see the knock-out? A. I really don't think it was a knock-out. The two of them were clinched and they fell over one on top of the other, and Valentin was underneath and he hit his head on the floor of the boat, and that's what I really think knocked him out.

(The Court then declared a recess until 98 two o'clock.)

After Recess.

(Trial Continued.)

In Rebuttal.

VALENTIN ENCARCION, recalled, testified as follows:

Direct examination by Mr. Castellano: 99

Q. Do you know what a stevedore hook is? A. I didn't use any.

Q. Do you know what a hook is? A. Yes.

Q. Did you try to use a hook on Frank? A. No, sir.

Q. Did you kick Frank in the shins or the testicles? A. No, sir.

Q. Did you try to kick Frank in the shins or testicles? A. No, sir.

Q. Did you call him a dirty name, cock sucker? A. I don't speak English.

Q. You did not use that language? A. No.

100 *Jose Cesteros—for Plaintiff—Rebuttal—Direct.*

By the Court:

Q. Did you try to hit Frank? A. No, sir.

By Mr. Castellano:

Q. Did you ever have any injury to your head before Frank hit you? A. No, sir.

Q. You never were hurt in the head? A. Never.

Q. You are sure about that? A. Sure.

101 *Cross examination by Mr. Hill:*

Q. I understand you to say you worked on these docks for seven years before the accident as a stevedore? A. This is the first place I worked in this country. I came here in 1920.

Re-direct examination by Mr. Castellano:

Q. And you always worked for Arbuckle Brothers? A. Yes.

Mr. Castellano: That's all.

102

Jose Cesteros, residing at 1945 7th Avenue, Manhattan, called as a witness in behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Castellano:

Q. Doctor, are you duly licensed to practise as a physician in the State of New York? A. Yes.

Q. And how long have you been practising as a physician? A. Four years.

103

Q. Where is your office? A. 1945 7th Avenue, New York City.

Q. And that is near what street? A. 117th Street.

Q. Do you know the plaintiff in this action, Mr. Valentin Encarnacion? A. Yes.

Q. Did you ever treat him? A. Yes.

Q. What is the first time that you treated him, doctor? A. I saw him November 27, 1926.

Q. Did you ever treat him before that day for anything? A. No.

104

Q. Did you know him before that day? A. No.

Q. What did you do for him on November 27, 1926? A. I examined him.

Q. What part of his body? A. I examined his head.

Q. And what did you find? A. I found that he was complaining of pus coming out of the right ear, and pain on the right side of the head.

Q. When you said right ear, you pointed to your left ear. A. The right side of his head; and constant headaches.

Q. Pus coming out of what ear?

105

Mr. Hill: He said he complained of that.

By the Court:

Q. Did you see pus coming out? A. Yes, sir.

By Mr. Castellano:

Q. And what else did you see actually at the time, besides pus coming out of his right ear? A. He complained of pain on the right side of his head, constant headaches, pus coming out of his

106 *Jose Cesteros—for Plaintiff—Rebuttal—Direct.*

ear. That is what he came there for, and on examination he could not open his mouth, just barely partially could open his mouth. I examined his ear and found there was pus coming out of his right ear on palpation, and found that the whole side of the right side of the face, of the mastoid over the ear, was very tender.

Q. And what did you do? A. I advised an X-ray picture because he gave us a history, on questioning he gave a history of having been struck and fallen. From that history I suspected
107 a fracture somewhere and I advised an X-ray picture.

Q. And when did you take the first X-ray set of pictures? A. They were taken November 27th, 1926.

Q. That was the very first day that he came there? A. Yes.

Q. Who took those first pictures? A. Dr. Valenta.

Q. Where is he? A. His office is 515 West End Avenue, New York City.

Q. Did you afterwards take other pictures of
108 him? A. Yes.

Q. When were the other pictures taken? A. March 5, 1928.

By the Court:

Q. Were you there when they were taken? A. Yes.

By Mr. Castellano:

Q. Were they taken in your presence? A. Yes.

Q. Developed in your presence? A. Yes.

Jose Cesteros—for Plaintiff—Rebuttal—Direct. 109

Q. Actually delivered to you on March 5, 1928? A. Yes.

Q. They have been in your possession ever since? A. Yes.

Q. Can you read those pictures to the Court and jury? A. Yes.

Mr. Hill: I object to it as immaterial, incompetent and irrelevant, and not properly connected, and the witness not qualified. He did not take them himself.

The Court: He said they were taken and 110
developed in his presence.

By the Court:

Q. Can you read X-ray plates? A. Yes.

The Court: I will allow it.
Mr. Hill: Exception.

By the Court:

Q. Are those the pictures that were taken in your presence? A. Yes.

111

By Mr. Castellano:

Q. How many are there? A. The first section of the pictures, five pictures; the second, two pictures.

Q. Were they all taken on March 5, 1928? A. This picture (indicating) was taken on the 5th of March, 1928.

By the Court:

Q. All of them? A. All of them.

112 *Jose Cesteros—for Plaintiff—Rebuttal—Direct.*

By Mr. Castellano:

Q. Seven altogether? A. Seven pictures.

Mr. Castellano: I offer them all in evidence.

Mr. Hill: I object to it as immaterial, incompetent and irrelevant and no proper foundation laid.

The Court: Mark them.

Mr. Hill: Exception.

113 (The pictures are received in evidence and marked Plaintiff's Exhibits 1, 2, 3, 4, 5, 6 and 7 respectively.)

By Mr. Castellano:

Q. Will you read one or two of those pictures, or all of them, if you will? Who took them? A. Dr. Suchoff.

Q. How do you spell his name? A. S-u-c-h-o-f-f.

Q. What is his first name? A. L. M., 1767 Madison Avenue.

Q. Tell us what the pictures show. A. The
114 pictures show a linear fracture on the right mastoid. It runs obliquely about the temporal maxillary region upward and backward, and that fracture included the jaw, a cross part of the jaw, began at the junction of the lower joint with the upper, which extended backward over the ear back of the mastoid.

Q. Into the base of the skull? A. Yes. The rest of the pictures were made to prove that in a different position to see the extent of the fracture.

Q. And how long is the line of fracture, doctor, about? A. About three and a half inches.

By the Court:

Q. Is that of the outer table? A. Yes.

Q. The outside of the skull? A. The outside of the skull, not inside.

Q. There are two plates to the skull, aren't there? A. Yes, the inner plate and the outer plate.

Q. And it is around the outside plate? A. It is around the outside plate. The other picture was taken, these two extra pictures, in case that you want to see every line of the scalp, it is taken to show the entire contour of the skull. The fracture sometimes is false if you don't take the plate, and when we found a fracture of the plate, we were forced to take two more pictures so that you could see the outline of the entire skull and you could see how the fracture would follow.

These are stereoscopic pictures.

By Mr. Castellano:

Q. What do those stereoscopic pictures show? A. The same fracture.

Q. They proved the fracture? A. Yes.

Q. After November 27, 1926, for how long a period did you continue to treat Valentin Encarnacion? A. I treated him up to now, because he has visited my office sometimes twice a month, three times a month, for the first four months twice a week, and then I observed him every month for fear that something might develop of pressure on his right side.

Mr. Hill: I move to strike out the latter part of the answer.

The Court: Granted.

118 *Jose Cesteros—for Plaintiff—Rebuttal—Direct.*

By Mr. Castellano:

Q. You have continuously treated him right up to date? A. Yes.

Q. And how long did the discharge of matter from his right ear continue? A. That lasted about six months.

Q. And have you cured that part of it? A. Yes, there is no discharge now.

Q. Is there any discharge from the nose, of blood? A. None now.

119 Mr. Hill: I object to it as leading.

The Court: He says there is none now.

By the Court:

Q. That fracture has all knitted, hasn't it? A. Yes, it has healed.

Q. And when was it healed? A. Six months. We cannot determine when it was healed.

Q. It had been healed up when you saw him? A. It had been healed up when I saw him.

Q. It was healed when the pictures were taken? A. Oh, yes.

120 Q. And all that you saw was the result of the fracture? A. Yes.

Q. The pictures do not show a fracture; they show there had been a fracture? A. Yes.

By Mr. Castellano:

Q. For how long did you treat the discharge from the ear? A. About six months.

Q. And how much of a discharge was there? A. Quite a bit.

Q. Profuse? A. Yes.

121

Q. And what did that discharge consist of? A. Just pus.

Q. Any blood in it? A. No blood.

Q. What is that discharge a symptom of? A. Of infection of the middle ear, or the mastoid.

Q. And that is due to what? A. An infection of the mastoid.

Q. And an infection is due to what? A. Probably an assault or a blow of some kind.

By the Court:

122

Q. It can be due to something else too? A. Yes.

Q. You can have mastoiditis without having an assault, can't you? A. Yes.

Q. So it may have come from that? A. Yes.

Q. You are not sure whether that came from the fracture? A. No.

The Court: Strike out all evidence of pus coming from the ear. Disregard it, gentlemen.

By Mr. Castellano:

123

Q. Assuming that Valentin Encarnacion, a man thirty years of age, had never had any injury to his head, that prior to May 19, 1925, he was a young man in good health; that while at work upon a barge he was hit a blow upon the eyes which knocked him to the barge floor, and which rendered him unconscious for a period of about two hours, and afterwards he is removed from there and is sent to a hospital where he remained eight days for treatment; that afterwards he had treatment as an outside patient for

124 *Jose Cesteros—for Plaintiff—Rebuttal—Direct.*

some months, and then, on November 27, 1926, he comes to your office and is found to be in the condition in which you have testified, can you say, with reasonable certainty, whether the condition which you found on November 27, 1926 is a result of the blow or trauma sustained by him on May 19, 1925?

Mr. Hill: I don't recall any testimony that there was any outside treatment following the hospital treatment.

125 The Court: There was some testimony that he went to a dispensary.

A. Yes.

By the Court:

Q. Do you think the assault would be a competent, producing cause? A. Yes.

Q. When did you first see him? A. November 27, 1926.

Q. And you did not take any pictures until March, 1928? A. The pictures were taken November 27, 1926, when he came there.

126 Q. I thought you said March, 1928. A. That was the second set of pictures.

By Mr. Castellano:

Q. Does the first set of pictures show some fracture? A. The first set of pictures shows some fracture.

Q. Do you say that Encarnacion now is well and able to go back to work? A. Well, he can do some work.

By the Court:

Q. Can he do any work? A. Some type of work he cannot do.

Q. He can do light work? A. He has to do light work.

By Mr. Castellano:

Q. Can he hear from the right ear? A. Not very well.

Q. What loss is there of hearing in the right ear? A. Probably forty per cent. loss. 128

Q. Is the injury to his head, this fracture, a permanent injury? A. Oh, yes.

Q. And is the injury, this loss of hearing, a permanent loss? A. Oh, yes.

Q. Since November, 1926, when you first began treating him, up to now, has he shown marked improvement, great improvement or little improvement? A. Very little improvement.

Q. Is there another doctor in Court who helped you in treating this patient? A. Yes.

Q. What is his name? A. Dr. Leroy Pellou.

Q. Do you treat patients in association with each other sometimes? A. Yes. 129

Q. What is the reasonable charge for the services which you rendered? A. Probably about $350. There are three doctors involved.

Mr. Hill: I object to it inasmuch as the bill of particulars limits it to $150.

Mr. Castellano: He says he spent $150, but he does not say how much he actually incurred. It is the second page of my bill of particulars.

Mr. Hill: It says the plaintiff expended.

130 *Jose Cesteros—for Plaintiff—Rebuttal—Cross.*

By Mr. Castellano:

Q. How much has he paid you on account of your bill? A. $65.

Q. And he owes you the rest? A. He owes me the rest, yes.

Cross examination by Mr. Hill:

Q. Doctor, you just stated that this fracture of the skull was permanent? A. Yes.

131 Q. What do you mean by that? A. The scar will be left for as long as he lives.

Q. But when he came to you, it had entirely healed up to that time? A. Yes, it had entirely healed.

Q. And the only trouble you found with him was this discharge from the ear and some trouble with his mouth? A. Yes, he could not open his mouth.

Q. That trouble with his mouth has cleared up, has it not? A. It is a little better.

Q. It is better? A. Yes.

132 Q. How many actions have you appeared for Mr. Castellano, the attorney in Court? A. Never.

Q. This is the first action that you have appeared for their office? A. Yes.

Re-direct examination by Mr. Castellano:

Q. Did you ever see me before today? A. Never.

The Court: I would like to have the plaintiff come back to the stand.

133

VALENTIN ENCARNACION, recalled, testifies as follows:

By the Court:

Q. Did you ever have any trouble with your ear before the trouble with Frank? A. No, sir.

Q. Were you ever hit on the head after Frank hit you? A. No, sir.

Q. Did you ever have any trouble with your head before the accident? A. No, sir.

Mr. Hill: I move to dismiss the complaint on the ground it appears affirmatively that the act complained of was that of a fellow-servant acting outside the scope of his employment. 134

The Court: Denied.

Mr. Hill: Exception.

Mr. Hill sums up to the jury on behalf of the defendant.

Mr. Castellano sums up to the jury on behalf of the plaintiff.

135

The Court then charged the jury as follows:

Charge of the Court.

LEWIS, *J.*:

Gentlemen of the Jury: You have now rendered service for about a week. Some of you may have had experience in cases before. You realize, of course, that everything that a witness says on the witness stand is not to be credited. You have in-

dicated by your verdicts in many cases your wisdom in separating testimony that you do not believe from testimony that you do believe, and that rule should apply in this case.

This plaintiff claims that he was assaulted by his foreman. The foreman is not being sued. Arbuckle Brothers are being sued, and the claim is that Frank, concededly the foreman in charge of this gang of sixteen laborers of which the plaintiff was one, was engaged in loading a barge. The
137 plaintiff says that while he was so engaged the foreman came along and said to him "Hurry up!" and used some profanity, and then, using some more unseemly language, punched him so violently that he fell to the floor of the barge and hit his head and thereby he sustained the injuries which have been testified to.

The law is that the master is not liable for every assault committed by his servant. The master is liable only when the acts of the employee are within the scope of his employment. It does not make any difference that the acts are done while the work is being prosecuted. That is not
138 the test; the test is whether they are done by the servant in furtherance of the master's business and are such as can fairly be said to have been authorized by the master—and by authorization is not meant expressly conferred—and whether they are such as are incident to the performance of the duties entrusted to the foreman by the master.

By way of illustration, so that you will understand that: If these two men, Frank and this plaintiff, got into a dispute arising out of some personal difference and Frank assaulted the plain-

tiff, there would be no liability. The master is responsible only if the assault was done by his foreman in the furtherance of the master's work. Now, bear that in mind.

If you find that that assault was committed in furtherance of the master's work and also that it was unprovoked, the plaintiff can succeed. When I say unprovoked I mean this: There is some testimony here by the foreman that he said something to the plaintiff with reference to his work, ordering him on the ship or what not, that there was a retort by the plaintiff, and that then 140 the plaintiff used a hook, stuck his finger in the foreman's eye and in his mouth, and used some profanity and resorted to other conduct, and that finally the foreman was compelled to use the force that he did in order to withstand the possibility of an attack upon him. Of course that would be a provoked assault, and I need not say to twelve intelligent men like you that under such circumstances, if you believe Frank, the plaintiff cannot succeed.

So you will analyze the evidence for the purpose of determining first whether the assault was 141 made in the furtherance of the master's duties, as I have defined them to you, and, secondly, whether it was provoked. Both those propositions must be established by the plaintiff by the greater weight of believable proof, and if that burden has been borne then you go to the question of damage.

Again let me emphasize what I have repeatedly said to juries, that you are not concluded by what the plaintiff says as to his injuries unless you believe it, and you are not concluded by what the doctor says as to the extent of the injuries. You

have a right to say that the doctor and the plaintiff have grossly exaggerated the condition; and, of course, the mere fact that a man stays out of work does not necessarily justify the conclusion that his doing so is due to the fact of an injury to his head. As I have said during the week—I think to some of you—some men prefer not to work, and it is the duty of every man who is hurt to do everything that is possible to minimize his damage. The plaintiff could have done some work. That evidence comes from the doctor himself.
143 Was this injury such that the plaintiff should have stayed out of work since May 19, 1925? I say to you that the evidence is to the contrary. How long was he, of necessity, out of work? That is the determining factor. And when I say, how long was he of necessity out of work? I mean this: How long did this injury prevent him from working? And when you have determined the length of time, you multiply it by his average daily or weekly wage. He would be entitled to that amount, and he would be entitled also to something for pain and suffering, and for the reason-
144 able medical bill of his doctor, and if you believe the injuries to be permanent, he would be entitled to something for that.

That is all there is to be said on the question of damage, and the mere fact that I talk about damages is no indication that I desire to convey an opinion to you as to my attitude. I give you the rule of damage so that if you reach that question you will know what to consider.

If this assault was committed in furtherance of the master's employment and was unprovoked, you go to the question of damage. If, on the con-

trary, you believe it was provoked or was not authorized, either expressly or impliedly, or done in the furtherance of the master's employment, then there must be a verdict for the defendant.

Do not be swayed by anything that the lawyers have said about promises or about what they will do after the rendition of a verdict. That does not mean anything. This is your problem, and you must decide this case on the evidence. When once you have decided it, this trial will be over, and promises made will have no effect whatsoever. You decide this case on the evidence, and then with your verdict everybody will be in accord. Do not be prejudiced at all, either one way or another. Leave out sympathy, and render a verdict based upon what you believe to be the fact.

Mr. Castellano: No requests.

Mr. Hill: No requests.

The Court: Retire.

(For verdict of jury and motions see Clerk's minutes.)

148

Stipulation as to Plaintiff's Exhibits 1 to 7, Inclusive, in Argument of Appeal.

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED, by and between the attorneys for the respective parties hereto, that the printing of Plaintiff's Exhibits 1 to 7, inclusive, be and the same is hereby dispensed with.

Dated, New York, April 25th, 1928.

MIELE & CASTELLANO,
Attorneys for Plaintiff-Respondent.

149

JAMES B. HENNEY,
Attorney for William A. Jamison,
Defendant-Appellant.

150

151

Affidavit of No Opinion.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

CHARLES G. HILL, being duly sworn, deposes and says: That he is an attorney-at-law associated with James B. Henney, the attorney for William A. Jamison, the defendant-appellant; that he tried the within action in behalf of William A. Jamison the defendant, and that no opinion was given by the trial Court.

CHARLES G. HILL. 152

Sworn to before me this }
24th day of April, 1928. }
CHAS. J. O'CONNOR,
Commissioner of Deeds,
City of New York.
Kings Co. Clerk's No. 3.
Term expires March 8, 1929.

153

154

Stipulation Settling Case.

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto, that the foregoing case on appeal contains all the evidence taken upon the trial, and all the exceptions of all the parties, and that an order may be entered herein settling the same as such, and ordering the same on file without further notice.

Dated, New York, April 25th, 1928.

MIELE & CASTELLANO,
155 Attorneys for Plaintiff-Respondent.

JAMES B. HENNEY,
Attorney for William A. Jamison,
Defendant-Appellant.

Order Settling Case.

Upon the foregoing stipulation, the foregoing case on appeal which contains all the evidence and
156 exceptions of all the parties, is hereby settled and ordered on file.

Dated, Brooklyn, N. Y., May 2, 1928.

H. E. LEWIS,
J. S. C.

157

Stipulation Waiving Certification.

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated by and between the attorneys for the respective parties hereto, that the foregoing are true copies of the judgment roll, motion for new trial, notice of appeal, the case and exceptions as settled, and the whole thereof now on file in the office of the Clerk of the County of Kings, and that certification thereof by said Clerk is hereby waived, and that an order directing the filing of the record in the Appellate Division may be entered without further notice. 158

Dated, New York, April 25th, 1928.

MIELE & CASTELLANO,
Attorneys for Plaintiff-Respondent.

JAMES B. HENNEY,
Attorney for William A. Jamison.
Defendant-Appellant.

Order Filing Record in Appellate Division. 159

Pursuant to the foregoing stipulation, it is

ORDERED, that the within printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

Dated, Brooklyn, N. Y., May 2, 1928.

H. E. LEWIS,
J. S. C.

ADDITIONAL PAPERS TO COURT OF APPEALS.

163

Notice of Appeal to Court of Appeals.

SUPREME COURT,

KINGS COUNTY.

VALENTIN ENCARNACION,

Plaintiff,

against

WILLIAM A. JAMISON and CHRISTINA ARBUCKLE, doing business under the firm name and style of Arbuckle Brothers, 164

Defendants.

PLEASE TAKE NOTICE that the above named plaintiff hereby appeals to the Court of Appeals from a judgment in the above entitled action in favor of the defendant, William A. Jamison, and against the plaintiff, entered in the office of the Clerk of the County of Kings, on the 16th day of July, 1928, reversing a judgment in said action entered in the Office of the Clerk of the County of Kings 165 on the 15th day of March, 1928, in favor of the plaintiff and against the defendant William A. Jamison, for the sum of Two thousand six hundred thirty-eight and 05/100 ($2,638.05) Dollars, and also from an order, ordering and adjudging that the judgment so appealed from be and the same is unanimously reversed upon the law and facts with costs, and the complaint be dismissed with costs, which order was duly entered in the Office of the Clerk of the Appellate Division of the

166 *Notice of Appeal to Court of Appeals.*

Supreme Court, Second Judicial Department, on the 28th day of June, 1928, and the plaintiff appeals from each and every part of said judgment of reversal, and from the said order entered herein.

Dated, New York, September 4th, 1928.

Yours &c.,

MIELE & CASTELLANO,
Attorneys for Plaintiff-Appellant,
Office and P. O. Address,
167 299 Broadway,
New York City.

To:

JAMES B. HENNEY, Esq.,
Attorney for Defendant
William A. Jamison, Respondent,
100 William St.,
New York City.

CLERK OF THE SUPREME COURT,
Kings County.

168

169

Order of Reversal.

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 28th day of June, 1928.

Present—Hon. Edward Lazansky,
Presiding Justice.
" J. Addison Young,
" Isaac M. Kapper, 170
" Albert H. F. Seeger,
" William B. Carswell,
Justices.

[Same Title.]

The above named William A. Jamison, a defendant in this action, having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Kings, on the 171
15th day of March, 1928, herein, and the said appeal having been argued by Mr. Theodore H. Lord of Counsel for the appellant, and argued by Mr. James A. Gray of Counsel for the respondent, and due deliberation having been had thereon,

It is Ordered and Adjudged that the judgment so appealed from be and the same is hereby unanimously reversed upon the law and the facts, with costs, and complaint dismissed, with costs.

Enter,

E. L.,
P. J.

172

Judgment of Reversal.

SUPREME COURT,

KINGS COUNTY.

[SAME TITLE.]

The defendant, William A. Jamison, having appealed to the Appellate Division of the Supreme Court, in and for the Second Judicial Department,
173 from the judgment entered herein, in the office of the Clerk of the County of Kings, on the 15th day of March, 1928, in favor of the plaintiff and against the defendant, William A. Jamison, in the sum of Two thousand six hundred thirty-eight and 05/100 ($2,638.05) Dollars, and said Appellate Division having heard said appeal, and by an order entered therein in the office of the Clerk of said Court, on the 28th day of June, 1928, having ordered and adjudged that said judgment, so appealed from, be unanimously reversed upon the law and the facts, with costs of said appeal,
174 and dismissed the complaint with costs to the defendant, William A. Jamison, and the record remitted from said Appellate Division having been filed in the office of the Clerk of the County of Kings, and the costs of the defendant, William A. Jamison, having been adjusted by the Clerk of this Court at the sum of $306.10,

Now, on motion of James B. Henney, the attorney for the defendant, William A. Jamison, it is

Judgment of Reversal. 175

ADJUDGED, that the judgment entered herein, in the office of the Clerk of the County of Kings, on the 15th day of March, 1928, in favor of the plaintiff and against the defendant, William A. Jamison, in the sum of Two thousand six hundred thirty-eight and 05/100 ($2,638.05) Dollars, be and the same is hereby unanimously reversed upon the law and the facts, with costs, and the complaint dismissed, with costs to the defendant, William A. Jamison, and that the defendant, William A. Jamison, do recover of said plaintiff the sum of $306.10, his costs as taxed, and said defendant, William A. Jamison, have execution therefor. 176

Judgment signed and entered this 16th day of July, 1928.

WILLIAM E. KELLY,
Clerk.
(SEAL)

177

173

Opinion of Appellate Division.

SUPREME COURT,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

LAZANSKY, *P.J.*, YOUNG, KAPPER, SEEGER and CARSWELL, *JJ.*

[SAME TITLE.]

179

APPEAL by defendant William A. Jamison from a judgment of the Supreme Court, entered in the office of the Clerk of the County of Kings on March 15, 1928, upon a verdict against him for $2,500 damages.

THEODORE H. LORD (Daniel Miner with him on the brief), for the Appellant.

JAMES A. GRAY, for the Respondent.

KAPPER, *J.*:

The action seeks to hold an employing stevedore for an assault committed by one of his em-
180 ployees, a "Foreman" or "gang-boss", upon a fellow-employee. The assault was inflicted while the plaintiff and the foreman were on a barge in the East River at the foot of Jay Street, Brooklyn, on May 10, 1925. The work in hand appears to have been the loading of the barge. Plaintiff claimed that this "foreman" called him an opprobrious name and told him to "hurry up", and upon the plaintiff retorting that he knew what work to do, the foreman punched him, causing him to fall. He claimed to have been seriously hurt.

The foreman testified that in this loading work he took "charge of a gang", that plaintiff was in his "gang", and that it was his duty "to keep" the men "busy all the time". He also testified that his wages were the same as that of the men in the "gang", and that at times he acted as a laborer and at other times "bossed the gang". The evidence permitted the conclusion that a gang boss or foreman assaulted an employee who was subject to his orders; and the verdict of the jury, under the charge of the learned trial Justice, found the employing stevedore liable for this assault, upon the theory that the same was committed "in the furtherance of the master's work".

In *Gabrielson* v. *Waydell* (135 N. Y. 1), it was held that the owners of a vessel are not liable for an assault by the ship's captain upon a seaman while on the high seas. While in respect of some matters a ship's captain is not a fellow-servant with the seaman under his authority, it is pointed out in the case cited that liability of owners of a vessel to a seaman for the act of the ship's captain is limited to duties resting upon the owners under the principles of the maritime law, which, by force of the situation, could only be discharged through the agency of the vessel's master. At any rate, the case is authority against liability of a ship's owner for an assault committed by the captain upon a seaman. Assuming that to be so, it necessarily follows that one of lesser authority than the captain could not bind his master for the consequences of a wilful wrong inflicted upon another in the same employment. And this view is conceded by the respondent, who seeks to overcome it only by what is urged as a change

184 *Opinion of Appellate Division.*

in the law. It is urged first that stevedores, like seamen, are now entitled to the benefits to be derived from jurisdiction of common law courts in cases involving maritime torts, and this is so (International Stevedoring Co. *v.* Haverty, 272 U. S. 50). It is then claimed that the ruling in Gabrielson *v.* Waydell (supra) has been made obsolete by the Act of Congress (referred to generally as the Jones Act), being Section 20 of the Act of March 4, 1915, as amended by Section 33 of the Act of June 5, 1920. This Act of Congress
185 extended to seamen the common law right or remedy given in cases of personal injury to railway employees (Panama R. R. Co. *v.* Johnson, 264 U. S. 375, 389). And because the Railway Employers' Liability Act declares an employer liable for injury resulting in whole or in part "from the negligence of any of the officers, agents, or employees" of such railroad company (Act of April 22, 1908, being entitled "An Act Relating to the liability of common carriers by railroad to their employees in certain cases") and thereby abolished the common law fellow-servant rule, it is
186 contended that the assault committed by this gang boss must be regarded as the act of a fellow-servant for which the master is liable within the principles now declared in cases of maritime tort. There is no analogy between the real case and the invoked rules. The Railway Employers' Act (supra) is explicit in predicating liability upon "negligence". No term or phrase other than "negligence" as a basis of liability is mentioned in the legislation. Certainly "assault" is nowhere mentioned or referred to. The entire theory of the Act is that of negligence as the term has been understood from time immemorial, empha-

sized by provisions for a diminution of damages recovered when there is found to be "negligence attributable to such employee", or he has "been guilty of contributory negligence". It is these provisions only which were extended to the "Jones Act" (supra), with the result, in my opinion, that the case of Gabrielson *v.* Waydell (supra), is still alive in so far as concerns a recovery of full indemnity for injury, as at common law.

The case involves nothing more than that of an assault by one employee upon another, and for 188 such an act a master is not responsible even though the assault be committed by one who thought a fellow-servant, subject to his orders, should have hurried his work a little more or done something in a different way. The master, neither expressly nor impliedly, employed the gang boss to commit an assault upon another employee.

In my opinion the action is not maintainable, and I therefore advise that the judgment be reversed upon the law and the facts, with costs, and that the complaint be dismissed, with costs.

189

190

Stipulation Waiving Certification of Record to Court of Appeals.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the Record on Appeal to and the opinion of the Appellate Division, on file with the Clerk of the Appellate Division, Second Department; the Notice of Appeal to the Court of Appeals; the Order of Reversal; the Judgment of Reversal; all of which are now on file with the Clerk of the
191 County of Kings. Certification thereof hereby is waived.

Dated, New York, October 4, 1928.

MIELE & CASTELLANO,
Attorneys for the Plaintiff-Appellant.

JAMES B. HENNEY,
Attorney for the Defendant-Respondent.

192

Order of Substitution of Parties Defendant. 193

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the eleventh day of July, A. D. 1929.

Present, Hon. Benjamin H. Cardozo,
Chief Judge, Presiding.

194

Valentin Encarnacion,
Appellant,

vs.

William A. Jamison and Christina Arbuckle, doing business, &c.,
Defendants,

William A. Jamison,
Respondent.

195

A Motion for re-argument of the motion heretofore denied on the 11th day of June, 1929, that Inez M. Jamison, William N. Dykman and Martin E. Goetzinger, executrix and executors of the last Will and Testament of William A. Jamison, deceased, be substituted as parties defendant-respondent in this action in place and stead of William A. Jamison, deceased, for the continuance of said action against them, for the amendment of all papers and proceedings accordingly and the reinstatement and re-argument of the appeal hav-

196 *Order of Substitution of Parties Defendant.*

ing been heretofore made upon the part of the appellant herein, and papers having duly submitted thereon, and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is granted.

WM. J. ARMSTRONG,
Clerk.

(SEAL)

(A copy)

197

198

Order of Reversal and Judgment Reinstating Verdict. 199

COURT OF APPEALS.

STATE OF NEW YORK, SS.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of July in the year of our Lord one thousand nine hundred and twenty-nine, before the Judges of said Court.

Witness, 200

The HON. BENJAMIN H. CARDOZO,
Chief Judge, presiding.

WM. J. ARMSTRONG, Clerk.
Remittitur *July 12, 1929.*

VALENTIN ENCARNACION,
Appellant,

against

WILLIAM A. JAMISON and CHRISTINA ARBUCKLE, doing business, &c., 201
Defendants,

INEZ M. JAMISON, WILLIAM H. DYKMAN and MARTIN E. GOETZINGER, Executrix and Executors of the last Will and Testament of William A. Jamison,
Defendants.

BE IT REMEMBERED, That on the 4th day of February in the year of our Lord one thousand nine hundred and twenty-nine Valentin Encarnacion the appellant in this cause, came here unto the

202 *Order of Reversal and Judgment Reinstating the Verdict.*

Court of Appeals, by Miele & Castellano, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Judgment and Order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Inez M. Jamison, William N. Dykman and Martin E. Goetzinger, Executrix and Executors the respondents in said cause, afterwards appeared in said Court of Appeals by James B. Henney, their attorney.

203 Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. James A. Gray, of counsel for the appellant, and by Mr. Theodore H. Lord, of counesl for the respondents, and after due deliberation had thereon, did order and adjudge that the Judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of Trial Term affirmed with costs in this court and in Appellate Division.

204 And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

THEREFORE, It is considered that the said Judgment of the Appellate Division be reversed and that of Trial Term affirmed with costs in this Court and in Appellate Division, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of

Order of Reversal and Judgment Reinstating the Verdict. 205

New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

WM. J. ARMSTRONG,
Clerk of the Court of Appeals,
State of New York.

COURT OF APPEALS, CLERK'S OFFICE, } 206
ALBANY, July 12th, 1929. }

I HEREBY CERTIFY that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

WM. J. ARMSTRONG,
Clerk.

207

208 **Order of the Supreme Court Directing Judgment in Accordance with Court of Appeals Order and Judgment.**

At a Special Term of the Supreme Court, Part II held in and for the County of Kings, at the County Court House, in the Borough of Brooklyn, City and State of New York, on the 7th day of August, 1929.

Present:

HONORABLE EDWARD J. BYRNE,

Justice.

209

VALENTIN ENCARNACION,

Plaintiff,

against

INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GOETZINGER, Executrix and Executors of the last Will and Testament of William A. Jamison, deceased,

Defendants.

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210 An appeal having been heretofore taken by the above named plaintiff to the Court of Appeals from a final judgment in the above entitled action, in favor of William A. Jamison and against plaintiff, entered in the office of the Clerk of the County of Kings on the 16th day of July, 1928, adjudging that the judgment entered herein in the office of the Clerk of the County of Kings on the 15th day of March, 1928 in favor of the plaintiff and against the defendant William A. Jamison in the sum of Two Thousand Six Hundred and Thirty-eight Dollars and Five Cents ($2,638.05) be and the same is hereby unanimously reversed upon the law, with costs, and the complaint dismissed with costs to the defendant William A. Jamison, and that the defendant William A. Jami-

Order of the Supreme Court Directing Judgment in Accordance with Court of Appeals Order and Judgment.

211

son do recover of said plaintiff the sum of Three Hundred and Six Dollars and Ten Cents ($306.10) costs as taxed, and that said defendant William A. Jamison have execution therefor, and the death of the said William A. Jamison having been suggested in the Court of Appeals, and the said Court of Appeals having by order dated the 11th day of July, 1929, substituted Inez M. Jamison, William N. Dykman and Martin E. Goetzinger, Executrix and Executors of the last Will and Testament of 212
William A. Jamison, deceased, as parties defendant-respondent in this action in place and stead of William A. Jamison, deceased, and having directed the continuance of said action against them, and the amendment of all papers and proceedings accordingly, and the said appeal having been heard by the said Court of Appeals and a decision rendered thereon, and an order and judgment entered thereon dated July 11, 1929, reversing said judgment so appealed from, and ordering that the said judgment of the Appellate Division be reversed and that of Trial Term affirmed, with costs in the Court of Appeals and the Appellate Divi- 213
sion, now upon reading and filing the said order and judgment of reversal of the Court of Appeals dated the 11th day of July, 1929, and upon all of the pleadings and proceedings heretofore had herein, and

On motion of Miele and Castellano, attorneys for the plaintiff, it is

Ordered that the said order and judgment of the Court of Appeals entered herein and dated July 11, 1929, be and the same hereby is made the judgment and order of this court.

Enter

E. J. B.,
J. S. C.

214

Judgment of the Supreme Court.

SUPREME COURT,

KINGS COUNTY.

VALENTIN ENCARNACION,

Plaintiff,

against

INEZ M. JAMISON, WILLIAM N. DYKMAN, and MARTIN E. GOETZINGER, Executrix and Executors of the Last Will and Testament of William
215 A. Jamison, deceased,

Defendants.

An Appeal having been heretofore taken by the above named plaintiff to the Court of Appeals from a final judgment in the above entitled action, in favor of William A. Jamison and against plaintiff, entered in the office of the Clerk of the County of Kings, on the 16th day of July, 1928, adjudging that the judgment entered herein in the office of the Clerk of the County of Kings on
216 the 15th day of March, 1928, in favor of the plaintiff and against the defendant William A. Jamison in the sum of Two Thousand Six Hundred and Thirty Eight Dollars and Five Cents ($2,638.05) be and the same is hereby unanimously reversed upon the law, with costs, and the complaint dismissed with costs to the defendant William A. Jamison, and that the defendant William A. Jamison do recover of the said plaintiff the sum of Three Hundred and Six Dollars and Ten Cents ($306.10) costs, as taxed, and that said defendant William A. Jamison have execution

therefor, and the death of the said William A. Jamison having been suggested in the Court of Appeals, and the said Court of Appeals having by order dated the 11th day of July, 1929 substituted Inez M. Jamison, William N. Dykman and Martin E. Goetzinger, Executrix and Executors of the Last Will and Testament of William A. Jamison, deceased, as parties defendant respondent in this action in place and stead of William A. Jamison, deceased, and having directed the continuance of said action against them and the amendment of all papers and proceedings accordingly, and the 218
said appeal having been heard by the said Court of Appeals and a decision rendered thereon, and an order and judgment entered thereon, dated July 11th, 1929, reversing said judgment so appealed from, and ordering and adjudging that the said judgment of the Appellate Division be reversed and that of Trial Term affirmed, with costs in the Court of Appeals and the Appellate Division, and by order of this Court, dated August 6, 1929, the judgment and order of the Court of Appeals, dated July 11, 1929, was made the judgment of this court and the plaintiff's costs in the 219
Appellate Division and Court of Appeals having been taxed in the sum of

Now on motion of Miele & Castellano, attorneys for the plaintiff, it is

Adjudged that the judgment entered herein in the office of the Clerk of the County of Kings on the 15th day of March, 1928, in favor of the plaintiff and against the defendant William A. Jamison in the sum of Two Thousand Six Hundred and Thirty Eight Dollar and Five Cents ($2,-

220 *Judgment of the Supreme Court.*

638.05) be and the same hereby is affirmed, as of that date, against Inez M. Jamison, William N. Dykman and Martin E. Goetzinger, as Executrix and Executors of the Last Will and Testament of William A. Jamison, deceased, and it is further

ADJUDGED that the said plaintiff recover of the said Inez M. Jamison, William N. Dykman and Martin E. Goetzinger, Executrix and Executors as aforesaid, the sum of Three Hundred Twenty-three Dollars and Fifty-five Cents ($323.55) costs
221 in the Appellate Division and Court of Appeals. Entered this 8th day of August, 1929.

WILLIAM E. KELLY,
Clerk.

222

226

Opinion.

VALENTIN ENCARNACION,
Appellant,

v.

INEZ M. JAMISON, et al., Executrix, etc., of WILLIAM A. JAMISON, Deceased,
Respondents.

(Decided July 11, 1929.)

227

APPEAL by plaintiff from a judgment of the Appellate Division, second department, reversing on the law a judgment of Trial Term entered upon the verdict of a jury against defendants' testator and dismissing the complaint.

JAMES A. GRAY for appellant.

THEODORE H. LORD for respondent.

POUND, J. Defendants' testator was an employing stevedore. Plaintiff was one of his employees who was assaulted by the foreman or gang boss in charge of a gang engaged in loading a barge
228 in the East river. The evidence justifies the inference that the foreman, in an effort to carry out his orders to keep the men busy and in furtherance of the employer's work, assaulted plaintiff, an employee subject to his orders, to make him hurry up with the work in which he was engaged. No question of negligence is in the case. The trial judge allowed a recovery if the jury found that "the assault was committed in the furtherance of the master's work." (*Mott* v. *Consumers Ice Co.*, 73 N. Y. 543, 547.) The jury so found. The Appellate Division reversed, applying the

fellow-servant rule and holding that there was no liability on the part of the employer even though the foreman inflicted the injuries when he was engaged in hurrying up the work in obedience to the employer's orders.

The cause of action having arisen upon the navigable waters of the United States, is to be disposed of under the principles of maritime law. (*International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *Northern Coal & Dock Co.* v. *Strand*, 278 U. S. 142; 49 Sup. Ct. Rep. 88; *Resigno* v. *Jarka Co., Inc.*, 248 N. Y. 225.) The foreman, in the 230
management of the work intrusted to him by his employer, is a fellow-servant of the members of the gang under his direction and control in the performance of the work. (*Crispin* v. *Babbitt*, 81 N. Y. 516.) For injuries suffered by the men placed under the authority of such a one as the result of his negligence or misconduct in the furtherance of the employer's business, it has been held that the employer is not liable to indemnify the injured employee. (*Gabrielson* v. *Waydell*, 135 N. Y. 1.) Such was the rule of the common law and of the admiralty law as defined by this 231
court.

The learned counsel for the appellant with admirable candor concedes that no fault can be found with the court below for adhering to the rule as thus stated, but he asks this court to change the law "to establish a better rule of conduct and give place to a higher degree of justice." Long and firmly established doctrines are not so easily disposed of, although the authority of recent cases of first impression has at times been disregarded in order to conform the decisions of the court to the actualities of industrial and business life.

232 *Opinion.*

(*Fitzwater* v. *Warren*, 206 N. Y. 355; *Klein* v. *Maravelas*, 219 N. Y. 383.) The *Gabrielson* case was decided by a divided court with a strong dissent. It has been subjected to much adverse criticism. While it may no longer be regarded as authority for the proposition of general maritime law that the misconduct of the captain of a ship in his care of the seamen under him is a risk assumed by the seamen for the consequences of which the owners are not responsible (*Gabrielson* v. *Waydell*, 67 Fed. Rep. 342; *The Osceola*, 189 U.
233 S. 158, 175), there remains in it a vestigial remnant of the once all-comprehensive fellow-servant rule, which was in its fullest glory in the year 1892, to wit, the rule of non-liability of the employer for assaults committed by a superior employee upon his inferior in the performance of the employer's work. To this extent it may be controlling upon this court if it remains in harmony with recent legislation on the subject.

The admiralty and maritime law is subject to change by Congress. Congress has acted and the Supreme Court of the United States has said
234 broadly (*International Stevedoring Co.* v. *Haverty, supra*) that "the statutes do away with the fellow-servant rule" as applied to longshoremen engaged in stowing freight in the hold of a ship within the admiralty and maritime jurisdiction of the United States. We would be content to give this declaration its full face value were it not for the fact that the case was one of the negligence, rather than the misconduct, of a foreman. It thus becomes necessary to examine the course of legislation on the subject to determine its bearing on our decisions.

235

The fellow-servant rule is generally stated in terms of negligence only, although misconduct of a co-employee is also within its scope. By the Seamen's Act of March 4, 1915 (38 Stat. ch. 153, Sec. 20), it was provided that "in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow-servants with those under authority." This language proved to be inadequate to substitute the common-law measure of liability for personal injuries for the maritime rule of limited liability in the case of 236
seamen (*Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372), and was probably appropriate only to the relief of seamen in any event. (*Yaconi* v. *Brady & Gioe, Inc.*, 246 N. Y. 300.) It was, however, a gesture in the direction of wider responsibility on the part of the master for the negligence of his servants. It was succeeded by the Jones Act (Merchant Marine Act of June 5, 1920; 41 Stat. ch. 250, Sec. 33; 3 Mason's U. S. Code, tit. 46, ch. 18, Sec. 688, p. 3273), which extends to seamen who shall suffer personal injury in the course of their employment, the rights and 237
remedies given by Congress to railroad employees (*Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 389; *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 324; *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130) by providing that they may maintain actions against their employers for damages and that in such actions "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply" to them. The reference is to the Federal Employers' Act of April 22, 1908 (35 Stat. ch. 149, Sec. 1; 3 Mason's U. S. Code, tit.

45, ch. 2, Sec. 51, p. 3064) and its amendments which is thus incorporated into the maritime law of the United States. That act, wherever applicable, read literally, imposes liability on the employer for the acts of a fellow-servant only in cases of personal injury to an employee resulting from negligence. Misconduct is not in terms included. (See, also, N. Y. Employers' Liability Law, ch. 121, L. 1921, which applies the vice-principal rule only to cases of negligence.) Nevertheless, Mr. Justice Holmes, writing for the United
239 States Supreme Court in the *Haverty Case* (supra), reads the act as doing away with the fellow-servant rule as freely as he reads the word "seamen" so as to include "stevedores." This, it would seem, is its popular interpretation. As the word "seamen" in the act includes "stevedores", so the word "negligence" should, "in view of the broad field in which Congress has disapproved and changed the (fellow-servant) rule introduced into the common law within less than a century," include "misconduct." Reading *Gabrielson* v. *Waydell* (supra) in the light of the
240 Merchant Marine Act and its history, we do not hesitate to say that the authority of the case as a rule of maritime law has been largely, if not fully, spent; that we should not waste time in pointing out distinctions between negligence and misconduct in this connection in order to defeat plaintiff's recovery but should hold broadly that Congress, in doing away with the fellow-servant rule in cases of negligence coming within the scope of its legislation, has left neither substance nor reason to our earlier decision and that it is no longer controlling. We cannot, with a fair countenance; say that the master is now liable to his servants

for personal injuries due to a careless foreman but is not liable for personal injuries inflicted on them by a brutal foreman in directing the performance of the work and intended and believed to be for the interest of the master. (*Mott* v. *Consumers Ice Co.*, supra).

This case differs materially from *Davis* v. *Green* (260 U. S. 349). In that case the engineer had received an order from the conductor which it was his duty to obey. Out of personal rancor, he killed the conductor. Neither allegations nor proof present the killing as having been done to further 242 the master's business.

The judgment of the Appellate Division should be reversed and that of the Trial Term affirmed, with costs, in this court and in the Appellate Division.

CARDOZO, CH. J., CRANE, LEHMAN, KELLOGG, O'BRIEN and HUBBS, JJ., concur.

Judgment accordingly.

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SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED SEP 11

CHARLES ELMO

No. 390

Supreme Court of the United States

OCTOBER TERM—1929.

INEZ M. JAMISON, WILLIAM N. DYKMAN, and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

against

VALENTIN ENCARNACION,

Respondent.

NOTICE, PETITION AND PETITIONERS' BRIEF ON APPLICATION FOR A WRIT OF CERTIORARI.

JAMES B. HENNEY,
Solicitor and Counsel for the Petitioners,
100 William Street,
Borough of Manhattan,
New York City.

JAMES B. HENNEY,
DANIEL MINER,
Of Counsel.

PRINTED IN THE UNITED STATES BY BENJ. H. TYRREL, INC., 110 GREENWICH ST., NEW YORK.

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Because of the importance of the questions involved to employers of seamen and all interstate railway carriers by the extension of this Act of Congress by the Court of Appeals beyond any construction placed upon this Act by this Court, and in apparent conflict with the Statute and the decisions of this Court, your petitioners ask that a writ of certiorari be granted. 30

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Supreme Court of the United States,

OCTOBER TERM—1929.

INEZ M. JAMISON, WILLIAM N. DYKMAN, and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

against

VALENTIN ENCARNACION,

Respondent.

PLEASE TAKE NOTICE, that upon the annexed petition of INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GEOTZINGER, as executrix and executors of William A. Jamison, deceased, and a certified copy of the entire transcript of record in this cause, including the proceedings in the Court of Appeals of the State of New York, and the Appellate Division of the Supreme Court, Second Department, which are the highest courts in which a decision of this cause could be had, submitted herewith, and the petitioners' brief hereto annexed, also to be submitted on the presentation of the petition, an application will be made to the Supreme Court of the United States at a session of said Court, appointed to be held at the Capitol, Washington, D. C., on the 7th day of October, 1929, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for a Writ of Certiorari, to be directed to the Supreme Court of the State of New York, Kings County, wherein the record is now

lodged to review the final determination herein of the Court of Appeals of the State of New York, the highest Court of the State of New York having jurisdiction in the premises, and the judgment of the Supreme Court of New York entered upon the order of the Court of Appeals.

Dated, New York, September 9th, 1929.

JAMES B. HENNEY,
Solicitor and Counsel for Petitioners,
Office & P. O. Address,
100 William Street,
Borough of Manhattan,
City of New York.

To:

MIELE & CASTELLANO, Esqs.,
Attorneys for VALENTIN ENCARNACION,
Office & P. O. Address,
299 Broadway,
Borough of Manhattan,
City of New York.

The Clerk of the County of Kings.

Supreme Court of the United States,

OCTOBER TERM—1929.

INEZ M. JAMISON, WILLIAM N. DYKMAN, and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,
Petitioners,

against

VALENTIN ENCARNACION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named, INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GOETZINGER, as Executrix and Executors of William A. Jamison, deceased, pray for a Writ of Certiorari to review the determination hereinafter described of the highest Court of the State of New York, having jurisdiction in the premises, and respectfully show:

The Questions Involved.

The questions presented are:

FIRST:—Whether the construction placed by the Court of Appeals of the State of New York upon the Federal Employer's Liability Act, United States Code, Title 45, Section 51, is not directly contrary to that given to it by the United States Supreme Court.

SECOND:—Whether, an assault by a foreman of a Stevedore under him, while loading a barge in navigable waters, without any proof of negligence, imposes liability on the Employer of the stevedore under the Federal Employers Liability Act, made applicable to seamen by the Jones Act, Title 46, Section 688.

THIRD:—Whether a stevedore, loading a barge in navigable waters, is entitled to the classification as a seaman where it does not appear that the barge was being used in loading or unloading a vessel, or that any crew of seamen is employed on the barge.

The Statutes Involved.

The provision of the Federal Employers Liability Act of April 22nd, 1908 (35 Stat. Ch. 149, Section 1), so far as pertinent is as follows:

> "Liability of Common Carriers by Railroad, in Inter-State or Foreign Commerce, for injuries to Employees from Negligence.—Every common carrier by railroad while engaging in commerce between any of the several states or territories
>
> . . . . . .
>
> shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." (Apr. 22, 1908, c. 149 § 1, 35, Stat. 65.)

This Statute is made applicable to seamen by the amendment of 1920 to the Jones Act, Merchants Marine Act of June 5th, 1920 (41 Stat. Ch. 250, Section 53) which is as follows:

> "Recovery for Injury to or Death of seaman.—Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all Statutes of the United States modifying or extending the Common Law Right or remedy in cases of personal injury to railway employees shall apply;"

The opinion of the Court of Appeals is reported in 251 N. Y. 213.

Facts.

1. The assault occurred on or about the 19th day of May, 1925.

2. This action was commenced by the service of the summons on the petitioners' testator, William A. Jamison, on the 20th day of November, 1925.

3. Christina Arbuckle, named in the summons as a defendant, was not served, and did not appear upon the trial.

4. Thereafter, James B. Henney served a notice of appearance as attorney for the defendant, William A. Jamison. The complaint in the action was thereafter served on the attorney for said defendant, who served an answer to the complaint in said action in behalf of the petitioners' testator, William A. Jamison, which alleged a general denial.

5. The complaint alleged that the plaintiff was a longshoreman employed by the defendant therein named, and at the time mentioned, was loading a barge in navigable waters. That while the plaintiff was at work, his foreman assaulted him, as a result of which he sustained a fractured skull. That this foreman was delegated by the defendant to

"give orders to the plaintiff and his fellow workers while working on said barge."

No other cause of action is alleged in the complaint, there is no negligence on the part of the defendant alleged or claimed.

6. On the 9th day of March, 1928, the action was tried before the Honorable Harry E. Lewis, Justice, and a jury, in the Supreme Court, Kings County, New York, on the issues raised by said complaint, and answer.

7. The plaintiff did not prove, nor did it appear on the trial that the employee committing the assault had shown any vicious or dangerous tendencies at any time before this assault.

8. No negligence was proved or attempted to be proved upon the trial.

9. The plaintiff produced evidence that the plaintiff was a stevedore in the employ of Arbuckle Brothers, under which name the defendant did business. That on the day of the assault he was loading a barge in the river off of Jay Street, when his foreman called to him to "hurry up". That the plaintiff told him to leave him alone, that he knew what work to do. Whereupon, the foreman struck him over the eye and he fell to the floor. The plaintiff's medical witness testified that he had a fractured skull and jaw.

10. The Trial Judge charged the jury that

> "The law is that the master is not liable for every assault committed by his servant. The master is liable only when the acts of the Employee are within the scope of his employment. It does not make any difference that the acts are done while the work is being prosecuted. That is not the test. The test is whether they are done by the servant in furtherance of the master's business and are such as can fairly be said to have been authorized by the master,—and by authorization is not meant expressly conferred—and whether they are such as are incident to the performance of the duties entrusted to the foreman by the master."

The Court did not submit to the jury the facts essential to a recovery under the Federal Employers Liability Act.

11. The defendant moved to dismiss the complaint at the close of the plaintiff's case and at the close of all the evidence on the ground that the act committed was that of a fellow servant acting without the scope of his employment, which motions were denied over the defendant's exceptions.

12. The jury awarded the plaintiff a verdict for $2500. upon which judgment was entered.

13. The Appellate Division of the Supreme Court of the State of New York reversed the judgment and dismissed the complaint, holding that the defendant's testator, William A. Jamison, the plaintiff's employer was not responsible for a willful assault committed by his foreman.

14. William A. Jamison, the sole defendant, appearing or answering the complaint, died on June 27th, 1929.

15. The death of the petitioner's testator, William A. Jamison, was not known to his attorney in this action, until the appeal had been argued in the Court of Appeals, when it was discovered and communicated to the plaintiff's attorney, and on his motion, the Court of Appeals permitted the petitioners to be substituted as parties defendant, and reversed the judgment of the Appellate Division, and reinstated the judgment of the Supreme Court, at Trial Term.

The Order and Remittitur of the Court of Appeals is dated July 11th, 1929. The judgment of the New York Supreme Court entered thereon was entered on August 8th, 1929.

16. The Court of Appeals held that there was no negligence on the part of the master proved, but construed the provision of the Federal Employers Liability Act which make the master's liability depend specifically upon negligence, to include liability for misconduct on

the part of foreman and as so construed, applied it under the Jones Act to seamen.

17. The petitioners now seek to review the final determination of the Court of Appeals of the State of New York that the Federal Employers Liability Act creates liability on the part of the employers, for misconduct of his foreman in assaulting an employee under him, when such misconduct does not constitute negligence, and further that the respondent was not performing work which brought him within the provisions of the Jones Law, Title 46, Section 688.

18. A transcript of the record of the case including the proceedings of the Court of Appeals and the Appellate Division of the Supreme Court, Second Department of the State of New York accompanies this petition.

WHEREFORE, your petitioners pray that a Writ of Certiorari may issue out of and under the seal of this court directed to the Supreme Court of the State of New York, Kings County, commanding said Court to certify this case to this court for review and determination as provided by the Act of Congress known as the Judicial Code and that your petitioners may have such other and further relief in the premises, as to the Court may seem appropriate and in conformity with said Act,

And your petitioners will forever pray

INEZ M. JAMISON,
WILLIAM N. DYKMAN,
MARTIN E. GOETZINGER,
as Executrix and Executors of
William A. Jamison, deceased,
by JAMES B. HENNEY,
their Solicitor and Counsel.

JAMES B. HENNEY,
Solicitor and Counsel.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK } ss.:
COUNTY OF NEW YORK

JAMES B. HENNEY, being duly sworn, says that he is the solicitor and Counsel herein of the petitioners named in the foregoing petition; that he has read the same and knows the contents thereof, and that the facts as stated are true to the best of his knowledge and belief.

JAMES B. HENNEY.

Sworn to before me this
9th day of September, 1929.
PAUL D. CARRIGG
Notary Public, New York County
New York Co. Clk's No. 446, Reg. No. 0-554
Kings Co. Clk's No. 196, Reg. No. 444
Bronx Co. Clk's No. 46, Reg. No. 3045-A
Queens Co. Clk's No. 1098, Reg. No. 3435
Commission Expires March 30, 1930
[SEAL]

CERTIFICATE OF COUNSEL.

I hereby certify that in my opinion the foregoing petition for a Writ of Certiorari is well founded in law.

JAMES B. HENNEY.

Supreme Court of the United States,
OCTOBER TERM—1929.

INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,
Petitioners,
against
VALENTIN ENCARNACION,
Respondent.

PETITIONERS' BRIEF ON APPLICATION FOR A WRIT OF CERTIORARI.

The Assault.

The plaintiff testified as follows:

Q. And was Frank there as your foreman since seven o'clock in the morning, too? A. Yes; seven o'clock the superintendent, and then it was Frank.

Q. First the superintendent, and then he brought Frank? A. Yes.

Q. How long was Frank working on May 19, 1925? A. Five or six months.

Q. On that day did he start to work with you at seven o'clock in the morning? A. Yes.

Q. About eleven o'clock or half-past eleven in the morning what happened? A. I worked, and he come and hollered to me and called me some name.

Q. What kind of work were you doing? A. Stevedore.

Q. What kind of stevedoring work were you doing? A. Everything.

Q. Were you loading or unloading barges? A. Loading barges.

By the Court:

Q. What did he say? A. He called me and said "Hurry up, you black bastard son-of-a-bitch."

By Mr. Castellano:

Q. And what did you say to him? A. I said, "Leave me alone today. I am here for four or five years and I can do the work and I know what work to do."

Q. And what did he say then? A. He give me a punch and I fall down.

Q. Where did he punch you? A. Right in my eyes.

Q. Right over your eyes? A. Yes, sir.

Q. Which eye? A. Right here (indicating) and I fall down to the floor. (Transcript of Record, fols. 43-46).

The further facts are stated in the foregoing petition.

POINT I.

The Federal Employers Liability Act of April 22, 1908 (35 Stat. Ch. 149; Sec. 1, Mason's United States Code), Title 45, Section 51, made applicable to seamen, by Merchant Marine Act of June 5th, 1920 (41 Stat. Ch. 250; Section 53, Mason's United States Code) Title 46, Section 688, known as the Jones Law does not extend the employers liability to a willful assault of a workman by his foreman in the absence of negligence.

The United States Circuit Court of Appeals, Second Circuit, on August 19th, 1929, handed down its decision in *Cain* v. *Alpha Steamship Corporation* and although affirming a judgment for the plaintiff refused to follow the decision of the Court of Appeals in *Encarnacion* vs. *Jamison* case, which holds that the Federal Employers

Liability Act extended the Employers responsibility to "misconduct" of its officers, agents and employees. In the course of the opinion, the Circuit Court of Appeals said:

> "In the absence of compelling authority we see no valid reason to extend the fellow servant exception beyond the field of negligence. Even in its restricted scope it has not escaped criticism, and has by statute frequently been curtailed or abolished. It was abolished in respect to negligent injury of railroad employees engaged in interstate commerce by the Federal Employers' Liability Act (35 Stat. 65), and the benefits of that legislation were by the Jones Act extended to seamen who suffer personal injury in the course of their employment (41 Stat. 1007). While the plaintiff's cause of action cannot, in our opinion, be rested upon the Jones Act (compare Encarnacion *v.* Jamison), which by incorporating the Federal Employers' Liability Act requires negligence as the foundation of liability (Ches. & Oh. Ry. Co. *v.* Stapleton, U. S. Sup. Ct. May 27, 1929,) the statutes may appropriately be referred to as showing the legislative tendency already mentioned.
>
> Precise authorities are surprisingly few and unconvincing."

We understand that a Writ of Certiorari will be applied for in the Cain suit.

The Federal Employers Liability Act of April 22nd, 1908 (35 Stat. Ch. 149, Section 1), in clear unequivocal terms makes "negligence" the basis of liability under that act. It provides in part that every common carrier by railroad . . .

> "shall be liable in damages to any person suffering injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

The Federal Employers Liability Act was passed in 1908. In 1920, the Jones Act was amended extending

the provisions of the Federal Employers Liability Act to seamen. The Jones Law, Merchant Marine Act of June 5th, 1920 (41 Stat. Ch. 250, Section 53), provides that

> "Any seaman who shall suffer personal injuries in the course of his employment may at his election, maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States *modifying or extending the common law right or remedy* in cases of personal injury to railroad employees shall apply. (Italics is ours.)

The Court of Appeals has added a cause of action due to misconduct to the Federal Employers' Liability Act.

The Court of Appeals of the State of New York reinstated the verdict for the plaintiff and held

> FIRST: That the plaintiff had no action at common law.
>
> SECOND: That the facts brought the plaintiff under the amendment of the Jones Law and that although no negligence was established, the Federal Employers Liability Act created liability for the mere misconduct of a co-employee in the course of the work.

In passing on the first question, the Court of Appeals said:

> "The learned counsel for the appellant with admirable candor concedes that no fault can be found with the court below for adhering to the rule as thus stated, but he asks this court to change the law 'to establish a better rule of conduct and give place to a higher degree of justice.' Long and firmly established doctrines are not so

easily disposed of, although the authority of recent cases of first impression has at times been disregarded in order to conform the decisions of the court to the actualities of industrial and business life. (*Fitzwater* v. *Warren*, 206 N. Y. 355; *Klein* v. *Maravelas*, 219 N. Y. 383.) The *Gabrielson* case was decided by a divided court with a strong dissent. It has been subjected to much adverse criticism. While it may no longer be regarded as authority for the proposition of general maritime law that the misconduct of the captain of a ship in his care of the seaman under him is a risk assumed by the seamen for the consequences of which the owners are not responsible (*Gabrielson* v. *Waydell*, 67 Fed. Rep. 342; *The Osceola*, 189 U. S. 158, 175), there remains in it a vestigial remnant of the once all-comprehensive fellow-servant rule, which was in its fullest glory in the year 1892, to wit, the rule of non-liability of the employer for assaults committed by a superior employee upon his inferior in the performance of the employer's work. To this extent it may be controlling upon this court if it remains in harmony with recent legislation on the subject."

In holding that the plaintiff made out a case under the Federal Employers' Act, the Court of Appeals said:—

"The admiralty and maritime law is subject to change by Congress. Congress has acted and the Supreme Court of the United States has said broadly (*International Stevedoring Co.* v. *Haverty, supra*) that 'the statutes do away with the fellow-servant rule' as applied to longshoremen engaged in stowing freight in the hold of a ship within the admiralty and maritime jurisdiction of the United States. We would be content to give this declaration its full face value were it not for the fact that the case was one of the negligence, rather than the misconduct, of a foreman. It thus becomes necessary to examine the course of legislation on the subject to determine its bearing on our decisions.

The fellow-servant rule is generally stated in terms of negligence only, although misconduct of a co-employee is also within its scope. By the Seamen's Act of March 4, 1915 (38 Stat. ch. 153, Sec. 20), it was provided that 'in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow-servants with those under authority.' This language proved to be inadequate to substitute the common-law measure of liability for personal injuries for the maritime rule of limited liability in the case of seamen (*Chelentis* v. *Luckenbach, S. S. Co., 247 U. S. 372*), and was probably appropriate only to the relief of seamen in any event. (*Yaconi* v. *Brady & Gioe, Inc. 246 N. Y. 300.*) It was, however, a gesture in the direction of wider responsibility on the part of the master for the negligence of his servants. It was succeeded by the Jones Act (Merchant Marine Act of June 5, 1920; 41 Stat. ch. 250, Sec. 53; 3 Mason's U. S. Code, tit. 46, ch. 18, Sec. 688, p. 3273), which extends to seamen who shall suffer personal injury in the course of their employment, the rights and remedies given by Congress to railroad empoyees (*Panama R. R. Co.* v. *Johnson, 264 U. S. 375, 389; Baltimore S. S. Co.* v. *Phillips, 274 U. S. 316, 324; Pacific S. S. Co.* v. *Peterson, 278 U. S. 130*) by providing that they may maintain actions against their employers for damages and that in such actions 'all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply' to them. The reference is to the Federal Employers' Act of April 22, 1908 (35 Stat. ch. 149, Sec. 1; 3 Mason's U. S. Code, tit. 45, ch. 2, Sec. 51, p. 3064) and its amendments which is thus incorporated into the maritime law of the United States. That act, wherever applicable, read literally, imposes liability on the employer for the acts of a fellow-servant only in cases of personal injury to an employee resulting from negligence. Misconduct is not in terms included. (See, also, N. Y. Employers' Liability Law, ch. 121, L.

1921, which applies the vice-principal rule only to cases of negligence.) Nevertheless, Mr. Justice Holmes, writing for the United States Supreme Court in the *Haverty Case* (*supra*) reads the act as doing away with the fellow-servant rule as freely as he reads the word 'seaman' so as to include 'stevedores.' This, it would seem, is its popular interpretation. As the words 'seaman' in the act includes 'stevedores', so the word 'negligence' should 'in view of the broad field in which Congress has disapproved and changed the (fellow-servant) rule introduced into the common law within less than a century,' include 'misconduct.' Reading *Gabrielson* v. *Waydell* (*supra*) in the light of the Merchant Marine Act and its history, we do not hesitate to say that the authority of the case as a rule of maritime law has been largely, if not fully spent; that we should not waste time in pointing out distinctions between negligence and misconduct in this connection in order to defeat plaintiff's recovery but should hold broadly that Congress, in doing away with the fellow-servant rule in cases of negligence coming within the scope of its legislation, has left neither substance nor reason to our earlier decision and that it is no longer controlling. We cannot, with a fair countenance, say that the master is now liable to his servants for personal injuries due to a careless foreman but is not liable for personal injuries inflicted on them by a brutal foreman in directing the performance of the work and intended and believed to be for the interest of the master. (*Mott* v. *Consumers Ice Co. supra*)."

The Federal Employers Liability Act does not add to the common law duties of a master to his servant. The cause of action created results solely from the statutory abrogation of the common law rule exempting the master from liability for the negligence of a fellow servant and, the modification of the common law rule of contributory negligence. The construction placed on this Act by the Court of Appeals creates a new duty on the part of the

master hitherto unknown. It is impossible to find an provision of the Act referring to liability for "miscon duct". If "misconduct" can be read into the Statute, an other word extending the master's liability can equall well be read into the Act, and there is no limitation to th addition of such new rights, if the Court of Appeals open ing up of this novel method of interpreting this Statute i sustained.

Your petitioners' counsel confidently assert that al decisions of all other State and Federal Courts includ ing several in the United States Supreme Court unani mously hold that liability under the Federal Employers Liability Act depends upon proof of negligence.

In

Chesapeake & Ohio R. R. Co. vs. *Stapleton*, 7 Law Ed. 540, decided May 27th, 1929 not ye officially reported,

defendant in error obtained a verdict in a personal in jury action. On the trial he proved no negligent act o omission, but relied solely on the fact that the defendan in error was employed in violation of a State Statut which the State Court had held was negligence as a mat ter of law. In reversing the judgment, this court said:

> "The language of the Federal Employers Lia bility Act shows unmistakably that the basis of re covering is negligence. That without such negli gence no cause of action is given under this Act."

The Federal Employers Liability Act creates a new obligation in the event of negligence and the courts cannot extend such obligation to cover misconduct.

In

Barnet vs. *National Bank*, 98 U. S. 555, 558,

this court said:

> "When a Statute creates a new right or offense and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive. Farmers & Mechanics Nat'l. Bank *v.* Dearing, 91 U. S. 29."

In

Shaw vs. Railroad Co., 101 U. S. 557, 561,

this court said:

> "No statute is to be construed as altering the common law further than its words impart. It is not to be construed as making any innovation upon the common law which it does not fairly express."

The Federal Employers Liability Act "unmistakably" bases the employers liability on negligence, and no words can be read into it by implication to extend it beyond its express meaning.

In

Yerke vs. *United States*, 173 U. S. 439, 442,

this court said:

> "The act of 1891 is not ambiguous, its clearness does not need and may not be construed by analogies from other statutes."

See also

Lake Country vs. *Rolkus*, 130 U. S. 662.

In

Kepner v. *United States*, 195 U. S. 100, 125,

this court said:

> "It is a well settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling."
>
> "And again in ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law from which it was taken, 1 Kent. Com. 336, U. S. *v.* Wong Kin, Ark. 169, U. S. 640."

In

Marvil v. *Merritt Collection*, 116 U. S. 11,

this court said:

> "The words used are not technical either as having a special sense by commercial usage, nor as having a scientific meaning different from their popular meaning. They are words of common speech."

No words extending its application can by implication be read into the statute.

In

United States vs. *B. & O. Southwestern R. R.*, 222 U. S. 8, 13,

this court said:

> "If however there is no ambiguity, the words of the Statute are the measure of its meaning."

See also,

American Express Co. v. *United States*, 212 U. S. 522, 534, 535.
Dewey v. *United States*, 178 U. S. 510, 520.
United States vs. *Chase*, 135 U. S. 255, 261.

The courts may not read additional words into an unambiguous statute on the theory that Congress must have intended to make the statute cover this added subject.

In

Dewey v. *United States*, 178 U. S. 510, 520, 521,

this court said:

> "Of course our duty is to give effect to the will of Congress touching this matter. But we must ascertain that will from the words Congress has chosen to employ interpreting such words according to their ordinary meaning as well as in the light of all the circumstances that may fairly be regarded as having been within the knowledge of the legislative branch of the Government at the time it acted on the subject. There is undoubtedly force in the suggestion that in rewarding officers and sailors who have sunk or destroyed the enemy's vessels in a naval engagement, it is not unreasonable that all the difficulties of every kind, with which they were confronted, while engaging the enemy should be taken into consideration. But that is a matter which we cannot suppose was overlooked by Congress; and we are not at liberty to suppose that it proceeded upon the broad basis suggested when it is expressly declared that the amount of its bounty shall depend upon the question whether 'the enemy Vessel'—not the enemy's vessel and the land, batteries, mines and torpedors, by which it was supported—was inferior or of equal or superior force."

And again

> "This court has nothing to do with questions of mere policy that may be supposed to underlie this action of Congress. What is termed the policy of the government in reference to any particular subject of legislation this court has said "is gen-

erally a very uncertain thing upon which all sorts of opinions each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of Statutes. Hadden *v.* The Collector, 5 Wall. 107, 111. Our province is to declare what the law is, and not under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government so to depart from sound rules of construction as in effect to adjudge that to be the law, which Congress has not enacted as such. Here the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the Statute involves no absurdity or contradiction and there is consequently no room for construction. Our duty is to give effect to the will of Congress as thus plainly expressed. United States *vs.* Fisher, 2 Cranch, 358, 399, Lake County *v.* Rollins, 130 U. S. 662, 670."

In

United States vs. *Chase*, 135 U. S. 255, at p. 261,

referring to the Lewd publications statute, Section 1 of the Act of July 12, 1876, this court said:

"Another argument on which indictments of this character which have been sustained by some of the Circuit Courts is that a reasonable construction must be given the Statute, and, it being evident that Congress intended to exclude anything of an obscene character from the mails, it is immaterial, whether the thing prohibited is inside or outside an envelope, and therefore unreasonable to hold that Congress intended not to allow a decent writing in an obscene envelope but at the same time to allow obscene writing in a proper envelope. We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as important and in ascertaining

> the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the Statute; or implied from a fair interpretation of its context. Even though they may involve the same mischief the statute was designed to suppress."

Citing

> *United States* v. *Sheldon*, 2 Wheat, 119,
> *United States* v. *Wiltberger*, 5 Wheat, 76, 95,
> *United States* v. *Morris*, 14 Peters 464, 475,
> *United States* v. *Hartwill*, 6 Wall, 385,
> *United States* vs. *Reese*, 92 U. S. 214.

In

> *United States* vs. *Goldberg*, 168 U. S. 95, 103,

this court said:

> "No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the Statute."

In

> *Newhill* v. *Sanger*, 92 U. S. 761, 765,

construing Section 6, Act of March 3rd, 1853, introducing the land system into California (10 Stat. 246), this court said:

> "This section expressly excludes from preemption and sale all lands claimed under any foreign grant or title. It is said that this means 'lawfully' claimed but there is no authority to import a word into a statute in order to change its meaning."

When Congress by amendment of the Jones Law extended, the rights under the Federal Employers Liability Act to seamen, it thereby ratified the construction of the Courts, that the cause of action erected was founded solely on negligence.

The re-enactment of a statute, by amendment or otherwise, constitutes a ratification of prior judicial construction and in the absence of obvious error, is regarded as read into the re-enactment.

In

New Haven R. R. vs. *Industrial Com. Com.*, 200 U. S. 361, 401, 402,

this court indicated that the decisions of the Court which had construed the statute, might not be in accord with its views of the United States Supreme Court if the question was an original one in that court. But it followed the prior interpretation and said:

> "We concede that the interpretation given by the Commission in these cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, because we think we are constrained to do so, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute which construction has long obtained in practical execution and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute."

The above decision was approved in

Copper Queen Mining Co. v. *Arizona Board*, 206 U. S. 474, 479,

although this court held that it was not applicable to the facts in the Copper Queen case. This court said:

> "When for a considerable time a statute notoriously has received a construction in practice, from those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed that the construction is satisfactory to the legislature unless plainly erroneous, since otherwise naturally the words would have been changed."

Prior to 1920, when the Jones Act extended the application of the Federal Employers Liability Act to seamen, the United States Supreme Court had distinctly held that the Federal Employers Liability Act only extended the Employers Liability where negligence was established.

This amendment of the Jones Act was a re-enactment of the Federal Employers Liability Act and by so doing, Congress ratified and approved the many decisions, limiting the liability thereby created to the precise language of the Act.

In

Seaboard Air Line v. *Horton*, 233 U. S. 492, decided in 1913,

The United States Court held

> "it was the intention of Congress to base the actions upon negligence only and to exclude responsibility of the carrier to its employee for defects and insufficiencies not attributable to negligence."
>
> "To hold that under the Statute the railroad company is liable for injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused is to take from the Act the words 'due to its negligence'. The plain effect of these words is to condition the liability upon negligence."

In

Southern Railway vs. *Gray,* 241 U. S. 333, 339, decided in 1916,

the court said in regard to the Federal Employers Liability Act, reversing a judgment entered upon a verdict for the plaintiff:

> "Negligence by the railway company is essential to a recovery."

Negligence of the Employer or of Its Officers, Agents or Employees Is Essential to a Recovery.

When Congress in 1920 extended to seamen the right of action under the Federal Employers Liability Act, it knew that the State and Federal Courts had consistently held for twelve years that this act only fastened liability on the employer for negligence.

The act itself is clear and unambiguous and bases liability solely on negligence. The decisions of the State and Federal Courts had clearly and without exception limited liability to cases of negligence.

If Congress had desired to give seamen a cause of action, for assault or any "misconduct" not amounting to negligence, it would have done so by the use of some specific language expressing such purpose.

The decision of this court in International Stevedoring Co. v. Haverty, 272 U. S. 50, relied upon by the Court of Appeals as a controlling authority in this court in favor of the cause of action in the suit at bar does not sustain the Court of Appeals' ruling.

In the *Haverty case,* this court held that a stevedore, in loading or unloading a vessel plying in navigable waters, was performing a seaman's work and was there-

fore, classed as a "seaman". This conclusion is founded on a historic review of seamen's duties, which establish that in former times, the seaman performed the work of loading and unloading their vessels, from which fact, this court considered that the segregation of this duty to stevedores did not remove it from the category of seamen's work, and therefore, reached the conclusion that the men performing seamen's work were to be classed as seamen.

Following the same process of reasoning, in the instant case, discloses the error in the Court of Appeals' application of the Haverty decision to this case. The word "assault" is of ancient and definite meaning. The word "negligent" is of less ancient, but no less definite meaning. An "assault" signifies a willful or intentional trespass upon the body of another.

Negligence is the failure to exercise ordinary care whereby another is injured in his person or property.

Since common law times "assault" has meant one thing and "negligence" has meant an entirely different thing.

The act of a stevedore, in loading or unloading a vessel was the same as the act of a sailor doing the same work and so he has been classed as a seaman in the doing of that work. But the act of committing an assault and the act or inaction constituting negligence, have never at common law been regarded as the same thing, but totally different things.

This court in the *Haverty case* applied the rule that

> "things equal to the same thing are equal to each other".

This court in classifying a stevedore as a seaman, added nothing to the Statute. But the Court of Appeals has added to the Statute by inserting the word

> "misconduct".

If the Court of Appeals' decision stands the statute now reads:

> "Every common carrier * * * shall be liable in damages * * * for such injuries * * * resulting * * * from negligence (or misconduct)."

so that by that judicial extension of the Federal Employers Liability Act a new right is accorded employees of common carriers and seamen based on misconduct.

That right, does not depend upon a classification of employees, but solely upon the ipse dixit that Congress must have meant to create a right not mentioned in the act and therefore, the Court of Appeals has added it to the statute.

Gabrielson vs. Waydell, 67 Fed. Rep. 342, Distinguished.

The Court of Appeals cites *Gabrielson* v. *Waydell*, 67 Fed. Rep. 342.

After the Court of Appeals had held that Gabrielson had no common law cause of action in negligence he brought suit in the Federal Court and there obtained a judgment. It should be noted that the Federal Court did not pass on any question of negligence, but based the recovery on Admiralty rules which requires the owner to provide among other things a "seaworthy" vessel. The Court held that an incident of a "seaworthy" vessel was a competent crew, and that the captain who assaulted Gabrielson was shown to be incompetent by reason of his brutal conduct.

This decision, in no way indicates a ruling, contrary to that of the Court of Appeals in the *Gabrielson case.*

It is not out of place to say that the prevailing opinion in the *Gabrielson case* in the Court of Appeals, is far less convincing than the dissenting opinion, which urges that

the well established authority of the master of a vessel to use physical force in disciplining his crew, made the owner liable for a mis-use of this authority. It seems to petitioners' counsel that, this authority to use force, should have subjected the defendant Waydell to liability.

However, although a longshoreman loading or unloading a vessel, is a seaman under the Haverty decision, the employing stevedore and his foreman have not been vested with the authority of a master of a ship.

They have no express or implied authority to use force in keeping the longshoreman at work. So that in the case at bar, the respondent's case is not strengthened, even though the Court of Appeals' decision in the *Gabrielson case* should be overruled.

There is no evidence that the barge the respondent was loading was being used in connection with the loading or unloading of any vessel employing seamen, therefore, he is not shown to have been engaged in seamen's work and is not entitled to the benefits of the Federal Employers Liability Act.

There is no historic background from which to infer that seamen are or even were employed on harbor barges used to carry merchandise around the harbor.

The barge in question had a "captain" who operated it. The merchandise was loaded and unloaded by longshoremen, used solely for that purpose.

The historical review which disclosed that longshoremen loading or unloading a vessel, were doing the work that sailors formerly did, finds no parallel in this case. The respondent was engaged in loading a barge which had no seamen or sailors upon it, and it does not appear that such barges ever carried seamen.

The respondent was, therefore, doing mere longshoreman's work, unconnected with any vessel, employing sea-

men. He therefore is not entitled to the benefits of the Federal Employers' Liability Act, as made applicable to seamen.

Neither the questions of fact submitted by the trial court to the jury nor the law applicable to the facts establish a cause of action under the Federal Employers Liability Act.

CONCLUSION.

Because of the importance of the questions involved to Employers of Seamen and all interstate Railway carriers by the extension of this Act of Congress by the Court of Appeals beyond any construction placed upon this act by this court and in apparent conflict with the Statute and the decisions of this court your petitioners ask that a writ of certiorari be granted.

Respectfully submitted,

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FEB 1

Supreme Court of the United States

OCTOBER TERM—1929.

No. 390.

INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

against

VALENTIN ENCARNACION.

PETITIONERS' BRIEF.

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SUPREME COURT OF THE UNITED STATES.

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Petitioners,

against

VALENTIN ENCARNACION.

PETITIONERS' BRIEF.

Statement.

On Certiorari to Review a Judgment of the Supreme Court of New York, Entered on the Remittitur of the Court of Appeals Which Directed the Reinstatement of the Judgment in Favor of the Plaintiff at the Trial Term, Reversing a Judgment and Order of the Appellate Division of the Supreme Court for the Second Judicial Department Which Had Reversed the Judgment in Favor of the Plaintiff and Dismissed the Complaint.

The action was brought in the New York Supreme Court, Kings County, to recover damages for an assault committed by a gang foreman upon a stevedore working in his gang (5-6).

Upon the trial, the plaintiff had a verdict of $2,500. (31-33) upon which judgment was entered (12).

The Appellate Division of the Supreme Court, in the Second Judicial Department, reversed the judgment and

dismissed the complaint (58, 59), upon the ground that the assault was that of a fellow servant for which the master was not responsible (63).

The Court of Appeals reversed the Appellate Division, and reinstated the verdict, (199-206) on the ground that Merchant Marine Act of June 5th, 1920, Title 46, Section 688, known as the Jones Act, applied and that by that Act, the master became responsible for the "misconduct" of a foreman, although no negligence was proved (76, 81).

On the remittitur of the Court of Appeals judgment was entered for the plaintiff for $2,638.05 (219, 220).

This Court granted a Writ of Certiorari, to review this judgment entered on the remittitur of the Court of Appeals of the State of New York (83).

Pending the appeal to the Court of Appeals, William A. Jamison, the only defendant served in the action, died and the petitioners were substituted as his executrix and executors (65, 66).

Facts.

The Assault.

The assault is testified to by the injured man as follows (15):

> "Q. What kind of work were you doing? A. Stevedore.
>
> Q. What kind of stevedoring work were you doing? A. Everything.
>
> Q. Were you loading or unloading barges? A. Loading barges.
>
> By the Court:
>
> Q. What did he say? A. He called me and said, 'Hurry up, you black bastard son-of-a-bich.'
>
> By Mr. Castellano:
>
> Q. And what did you say to him? A. I said, 'Leave me alone today. I am here for four or

five years and I can do the work and I know what work to do.'

Q. And what did he say then? A. He give me a punch and I fall down.

Q. Where did he punch you? A. Right in my eyes.

Q. Right over your eyes? A. Yes, sir.

Q. Which eye? A. Right here (indicating) and I fall down to the floor."

The Work.

The gang of whom the plaintiff was one, was loading a barge which lay in the East River at the foot of Jay Street, Brooklyn (14) at the defendant's place of business; the plaintiff testified (42).

"Q. On May 19, 1925, were you working on barge No. 3? A. Yes.

Q. And was that barge in the river? A. Yes, sir.

Q. At the foot of Jay Street, Brooklyn? A. Yes."

There is no evidence that the barge had any crew, or was being used in loading any vessel, which employed seamen.

POINT I.

The Federal Employers' Liability Act of April 22, 1908, (35 Stat. Ch. 149; Sec. 1, Mason's United States Code), Title 45, Section 51, made applicable to seamen, by Merchant Marine Act of June 5th, 1920 (41 Stat. Ch. 250: Section 53, Mason's United States Code) Title 46, Section 688, known as the Jones Law does not extend the employers' liability to a willful assault of a workman by his foreman in the absence of negligence.

Mr. Justice Kapper writing for a unanimous Court in the Appellate Division in the Second Judicial Department reversing the judgment and dismissing the complaint said (60-63):

> "It is urged first that stevedores, like seamen, are now entitled to the benefits to be derived from jurisdiction of common law courts in cases involving maritime torts, and this is so (International Stevedoring Co. *v.* Haverty, 272 U. S. 50). It is then claimed that the ruling in Gabrielson *v.* Waydell (Supra) has been made obsolete by the Act of Congress (referred to generally as the Jones Act), being Section 20 of the Act of March 4, 1915, as amended by Section 33 of the Act of June 5, 1920. This Act of Congress extended to seamen the common law right or remedy given in cases of personal injury to railway employees (Panama R. R. Co. *v.* Johnson, 264 U. S. 375, 389). And because the Railway Employers' Liability Act declares an employer liable for injury resulting in whole or in part 'from the negligence of any of the officers, agents, or employees' of such railroad company (Act of April 22, 1908, being entitled 'An Act Relating to the liability of common carriers by railroad to their employees in certain cases') and thereby abolished the common law fellow-servant rule, it is contended that the assault committed by this gang boss must be regarded as the act of a

> fellow-servant for which the master is liable within the principles now declared in cases of maritime tort. There is no analogy between the real case and the invoked rules. The Railway Employers' Act (supra) is explicit in predicating liability upon 'negligence'. No term or phrase other than 'negligence' as a basis of liability is mentioned in the legislation. Certainly 'assault' is nowhere mentioned or referred to. The entire theory of the Act is that of negligence as the term has been understood from time immemorial, emphasized by provisions for a diminution of damages recovered when there is found to be 'negligence attributable to such employee', or he has 'been guilty of contributory negligence'. It is these provisions only which were extended to the 'Jones Act' (supra), with the result in my opinion, that the case of Gabrielson *v.* Waydell (supra), is still alive in so far as concerns a recovery of full indemnity for injury, as at common law".

The Federal Employers' Liability Act of April 22nd, 1908 (35 Stat. Ch. 149, Section 1), in clear unequivocal terms makes "negligence" the basis of liability under that act. It provides in part that every common carrier by railroad . . .

> "shall be liable in damages to any person suffering injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

In 1920, the Jones Act extended the provisions of the Federal Employers' Liability Act to seamen. The Jones Law, Merchant Marine Act of June 5th, 1920 (41 Stat. Ch. 250, Section 53) provides that:

> "Any seaman who shall suffer personal injuries in the course of his employment may at his election, maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States *modifying or extending the*

common law right or remedy in cases of personal injury to railroad employees shall apply." (Italics is ours).

The Court of Appeals has added a cause of action due to misconduct to the Federal Employers' Liability Act.

The Court of Appeals of the State of New York reinstated the verdict for the plaintiff, and held:

FIRST:—That the plaintiff had no action at common law.

SECOND:—That the facts brought the plaintiff under the amendment of the Jones Law, although no negligence was established, that the Federal Employers' Liability Act created liability for the mere misconduct of a co-employee in the course of the work.

In passing on the first question, the Court of Appeals said (231-233):

> "The learned counsel for the appellant with admirable candor concedes that no fault can be found with the court below for adhering to the rule as thus stated, but he asks this court to change the law 'to establish a better rule of conduct and give place to a higher degree of justice.' Long and firmly established doctrines are not so easily disposed of, although the authority of recent cases of first impression has at times been disregarded in order to conform the decisions of the court to the actualities of industrial and business life (*Fitzwater* v. *Warren*, 206 N. Y. 355; *Klein* v. *Maravelas*, 219 N. Y. 383). The *Gabrielson* case was decided by a divided court with a strong dissent. It has been subjected to much adverse criticism. While it may no longer be regarded as authority for the proposition of general maritime law that the misconduct of the captain of a ship in his care of the seaman under him is a risk assumed by the seaman for the consequences of which the owners are not responsible (*Gabrielson* v. *Waydell*, 67

Fed. Rep. 342; *The Osceola*, 189 U. S. 158, 175), there remains in it a vestigial remnant of the once all-comprehensive fellow-servant rule, which was in its fullest glory in the year 1892, to wit, the rule of non-liability of the employer for assaults committed by a superior employee upon his inferior in the performance of the employer's work. To this extent it may be controlling upon this court if it remains in harmony with recent legislation on the subject."

In holding that the plaintiff made out a case under the Federal Employers' Act, the Court of Appeals said (233-241):—

"The admiralty and maritime law is subject to change by Congress. Congress has acted and the Supreme Court of the United States has said broadly (*International Stevedoring Co.* v. *Haverty, supra*) that 'the statutes do away with the fellow-servant rule' as applied to longshoremen engaged in stowing freight in the hold of a ship within the admiralty and maritime jurisdiction of the United States. We would be content to give this declaration its full face value were it not for the fact that the case was one of the negligence, rather than the misconduct, of a foreman. It thus becomes necessary to examine the course of legislation on the subject to determine its bearing on our decisions.

The fellow-servant rule is generally stated in terms of negligence only, although misconduct of a co-employee is also within its scope. By the Seamen's Act of March 4, 1915 (38 Stat. ch. 153, Sec. 20), it was provided that 'in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow-servants with those under authority.' This language proved to be inadequate to substitute the common-law measure of liability for personal injuries for the maritime rule of limited liability in the case of seamen (*Chelentis* v. *Luckenbach, S. S. Co.*, 247 U. S. 372), and was probably appropriate only to the relief of seamen

in any event. (*Yaconi v. Brady & Gioe, Inc.*, 246 N. Y. 300). It was, however, a gesture in the direction of wider responsibility on the part of the master for the negligence of his servants. It was succeeded by the Jones Act (Merchant Marine Act of June 5, 1920; 41 Stat. ch. 250, Sec. 53; 3 Mason's U. S. Code, tit. 46, ch. 18, Sec. 688, p. 3273), which extends to seamen who shall suffer personal injury in the course of their employment, the rights and remedies given by Congress to Railroad employees (*Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 389; *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 324; *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130) by providing that they may maintain actions against their employers for damages and that in such actions 'all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply' to them. The reference is to the Federal Employers' Act of April 22, 1908, (35 Stat. ch. 149, Sec. 1; 3 Mason's U. S. Code, tit. 45 ch. 2, Sec. 51, p. 3064) and its amendments which is thus incorporated into the maritime law of the United States. That act, wherever applicable, read literally, imposes liability on the employer for the acts of a fellow-servant only in cases of personal injury to an employee resulting from negligence. Misconduct is not in terms included. (See, also, N. Y. Employers' Liability Law, ch. 121, L. 1921, which applies the vice-principle rule only to cases of negligence). Nevertheless, Mr. Justice Holmes, writing for the United States Supreme Court in the *Haverty Case* (supra) reads the act as doing away with the fellow-servant rule as freely as he reads the word 'seaman' so as to include 'stevedores'. This, it would seem, is its popular interpretation. As the word 'seaman' in the act includes 'stevedores', so the word 'negligence' should 'in view of the broad field in which Congress has disapproved and changed the (fellow-servant) rule introduced into the common law within less than a century', include 'misconduct'. Reading *Gabrielson* v. *Waydell* (supra) in the light of the Merchant Marine

> Act and its history, we do not hesitate to say that the authority of the case as a rule of maritime law has been largely, if not fully spent; that we should not waste time in pointing out distinctions between negligence and misconduct in this connection in order to defeat plaintiff's recovery but should hold broadly that Congress, in doing away with the fellow-servant rule in cases of negligence coming within the scope of its legislation, has left neither substance nor reason to our earlier decision and that it is no longer controlling. We cannot, with a fair countenance, say that the master is now liable to his servants for personal injuries due to a careless foreman but is not liable for personal injuries inflicted on them by a brutal foreman in directing the performance of the work and intended and believed to be for the interest of the master. (*Mott v. Consumers Ice Co.*, supra)."

When the Court of Appeals says:

> "we should not waste time in pointing out distinctions between negligence and misconduct • • • in order to defeat plaintiff's recovery",

we submit it overlooks the fact that it is not a question of "defeating" a cause of action, but of creating a cause of action. That whether a cause of action has been created depends upon the clear and unambiguous language of a Federal Statute, the mere reading of which leads to the irresistible conclusion that no recovery under the Statute is intended except in cases of "negligence", and this Court has so repeatedly held.

It seems to us that the Federal Act does not modify the Common Law, but instead, adopts in a modified form the comparative new and progressive principle of industrial insurance wholly alien to common law. The common law principles applicable to Master and Servant *pro-*

tect the servant *against injury* by imposing certain duties upon the master *in the doing of the work.*

Industrial insurance ignores the manner of doing the work, it creates no duties in regard thereto, and affords no protection against injury but concerns itself with the *injury,* on the theory that the industry should bear the burden of compensating all workmen injured in accidents arising out of and in the course of the work.

In passing the Federal Employers' Liability Act, Congress knew that a large number of employees were injured by the negligence of co-employees, for which the common law provided no remedy, and that many were injured as a result of the risks of the work, and not because of any negligence, which likewise were irremediable at common law. It chose to legislate entirely with the first class of injurie namely, those due to the negligence of fellow servants. It adopted in a modified form the principle of industrial insurance by making the common carrier an insurer against loss from injuries due to the negligence of a fellow servant.

If the principle of industrial insurance was ingrafted by the Courts into the Common Law, it would have to be applied to all cases arising between master and servant.

So far legislation recognizing the principle of industrial insurance has not attempted to apply it to all employers of labor, but has exempted certain classes and has classified "hazardous employments" and made the industry, not the individual employer, bear the burden of compensation by providing a fund derived in the main from premiums from all engaged in the industry. Or, as in the Federal Employees Liability Act has made it applicable to one industry, that of common carriers. In this instance, there is no specific fund provided but as the Act only applies to Common Carriers by rail or employers of

seamen, both of which require large capital, the burden is easily adjusted by each carrier. If, however, this principle was recognized by Common Law courts, it would have to be inforced against the small business as well as the large business enterprises. An accident due to no negligence of any kind or to the negligence of a fellow servant if compensated for in a common law action by imposing the principle of industrial insurance by making the employer an insurer against injuries would wipe out a small business enterprise.

The Common Law Courts could not create a fund for the payment of judgments, or compel a judgment in a common law action to be satisfied by other means than execution against the property of the judgment debtor. If the common law courts attempted to apply the principle of industrial insurance in master and servant cases, it would endanger all small business enterprises as each master would be responsible for the entire loss resulting from the obligation of insuring employees against loss from injuries due to accidents arising out of and in the course of the employment.

We submit that the Courts in applying common law rules of master and servant should not be influenced by Statutes either State or Federal which recognize the economic principle of industrial insurance.

The change from liability for negligence according to common law rules to that of insurance against loss for injuries should be left entirely to the legislative branch of government and the Common Law Courts should not extend a statute, beyond its terms, merely because, in their opinion, the legislative body may have intended to so provide but failed to express such intention nor we submit should the common law attempt to induct either the principle or spirit of industrial insurance into common law actions.

Turning again to the wording of the Federal Employers' Liability Act, it is impossible to find any language suggesting liability for "misconduct". If "misconduct" can be read into the Statute, any other word extending the master's liability for the conduct of fellow employees can equally well be read into the Act, libel, slander, malicious prosecution, false arrest or conduct not even tortious and there is no limitation to the addition of such new rights, if the Court of Appeals opening up of this remarkable method of interpreting this Statute is sustained.

Your petitioners' counsel confidently assert that all decisions of all other State and Federal Courts including several in this Court unanimously hold that liability under the Federal Employers' Liability Act depends upon proof of negligence.

In

Chesapeake & Ohio R.R. Co. v. *Stapleton*, 279 U. S. 587,

an injured workman obtained a verdict in a personal injury action. On the trial he proved no negligent act or omission, but relied solely on the fact that he was employed in violation of a State Statute which the State Court had held was negligence as a matter of law. In reversing the judgment, this court said:

> "The language of the Federal Employers' Liability Act shows unmistakably that the basis of recovering is negligence. That without such negligence no cause of action is given under this Act."

The Federal Employers' Liability Act creates a new obligation in the event of negligence and the courts cannot extend such obligation to cover misconduct.

In

Barnet vs. *National Bank*, 98 U. S. 555, 558,

this court said:

> "When a Statute creates a new right or offense and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive, Farmers & Mechanics Nat'l. Bank *v.* Dearing, 91 U. S. 29."

In

Shaw vs. *Railroad Co.*, 101 U. S. 557, 561,

this court said:

> "No statute is to be construed as altering the common law further than its words impart. It is not to be construed as making any innovation upon the common law which it does not fairly express."

The Federal Employers' Liability Act "Unmistakably" bases the employers' liability on negligence, and no words can be read into it by implication to extend it beyond its express meaning.

In

Marvil v. *Merritt Collection*, 116 U. S. 11,

this court said:

> "The words used are not technical either as having a special sense by commercial usage, nor as having a scientific meaning different from their popular meaning. They are words of common speech.

In

United States v. *B. & O. Southwestern R.R.*, 222 U. S. 8, 13,

this court said:

> "If however there is no ambiguity, the words of the Statute are the measure of its meaning."

See also,

American Express Co. v. *United States,* 212 U. S. 522, 534, 535.
Dewey v. *United States,* 178 U. S. 510, 520.
United States v. *Chase,* 135 U. S. 255, 261.

In

Kepner v. *United States.* 195 U. S. 100, 125,

this court said:

> "It is a well settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling."
> "And again in ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law from which it was taken, 1 Kent. Com. 336, U. S. *v.* Wong Kin, Ark. 169 U. S. 640."

In

Yerkes v. *United States,* 173 U. S. 439, 442,

this court said:

> "The act of 1891 is not ambiguous, its clearness does not need and may not be construed by analogies from other statutes."

See also

Lake Country v. *Rolkus,* 130 U. S. 662.

The courts may not read additional words into an unambiguous statute on the theory that Congress must have intended to make the statute cover the added subject.

In

Dewey vs. *United States,* 178 U. S. 510, 520, 521,

this court said:

"Of course our duty is to give effect to the will of Congress touching this matter. But we must ascertain that will from the words Congress has chosen to employ interpreting such words according to their ordinary meaning as well as in the light of all the circumstances that may fairly be regarded as having been within the knowledge of the legislative branch of the Government at the time it acted on the subject. There is undoubtedly force in the suggestion that in rewarding officers and sailors who have sunk or destroyed the enemy's vessels in a naval engagement, it is not unreasonable that all the difficulties of every kind, with which they were confronted, while engaging the enemy should be taken into consideration. But that is a matter which we cannot suppose was overlooked by Congress; and we are not at liberty to suppose that it proceeded upon the broad basis suggested when it is expressly declared that the amount of its bounty shall depend upon the question whether 'the enemy Vessel'—not the enemy's vessel and the land, batteries, mines and Torpedoes, by which it was supported—was inferior or of equal or superior force."

And again

"This court has nothing to do with questions of mere policy that may be supposed to underlie this action of Congress. What is termed the policy of the government in reference to any particular subject of legislation this court has said 'is generally a very uncertain thing upon which all sorts of opinions each variant from the other, may be formed by different persons'. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of Statutes. Hadden *v.* The Collector, 5 Wall. 107, 111. Our province is to declare what the law is, and not under the guise of interpretation or under the influence of what may be surmised to be the policy of the government so to depart from sound rules of construction as in effect to adjudge that to be

> the law, which Congress has not enacted as such. Here the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the Statute involves no absurdity or contradiction and there is consequently no room for construction. Our duty is to give effect to the will of Congress, as thus plainly expressed. United States *v.* Fisher, 2 Cranch, 358, 399, Lake County *v.* Rollins, 130 U. S. 662, 670."

In

United States vs. *Chase,* 135 U. S. 255, at p. 261,

referring to the Lewd publications statute, Section 1 of the Act of July 12, 1876, this court said:

> "Another argument on which indictments of this character have been sustained by some of the Circuit Courts is that a reasonable construction must be given the Statute, and, it being evident that Congress intended to exclude anything of an obscene character from the mails, it is immaterial, whether the thing prohibited is inside or outside an envelope, and therefore, unreasonable to hold that Congress intended not to allow a decent writing in an obscene envelope but at the same time to allow obscene writing in a proper envelope. We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as important and in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the Statute; or implied from a fair interpretation of its context. Even though they may involve the same mischief the statute was designed to suppress."

Citing

United States v. *Sheldon*, 2 Wheat 119.
United States v. *Wiltberger*, 5 Wheat, 76, 95.
United States v. *Morris*, 14 Peters 464, 475.
United States v. *Hartwill*, 6 Wall, 385.
United States v. *Reese*, 92 U. S. 214.

In

United States v. *Goldberg*, 168 U. S. 95, 103, this court said:

> "No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the Statute."

In

Newhill v. *Sanger*, 92 U. S. 761, 765,

construing Section 6, Act of March 3rd, 1853, introducing the land system into California (10 Stat. 246), this court said:—

> "This section expressly excludes from preemption and sale all lands claimed under any foreign grant or title. It is said that this means 'lawfully' claimed but there is no authority to import a word into a statute in order to change its meaning."

The re-enactment of a statute, by amendment or otherwise, constitutes a ratification of prior judicial construction and in the absence of obvious error, is regarded as read into the re-enactment.

When Congress by amendment of the Jones Law extended the rights under the Federal Employers' Liability Act to seamen, it thereby ratified the construction of the courts, that the cause of action created was founded solely on negligence.

In

New Haven R. R. vs. *Industrial Com. Com.*, 200 U. S. 361, 401, 402,

this court indicated that the decisions of the Commission which had construed the statute, might not be in accord with the view of the United States Supreme Court if the question was an original one in that court. But it followed the prior interpretation and said:

> "We concede that the interpretation given by the Commission in these cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, because we think we are constrained to do so, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute which construction has long obtained in practical execution and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute."

The above decision was approved in

Copper Queen Mining Co. v. *Arizona Board*, 206 U. S. 474, 479,

although this court held that it was not applicable to the facts in the Copper Queen case. The court said:

> "When for a considerable time a statute notoriously has received a construction in practice, from those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed that the construction is satisfactory to the legislature unless plainly erroneous, since otherwise naturally the words would have been changed."

Prior to 1920, when the Jones Act extended the application of the Federal Employers Liability Act to seamen, the United States Supreme Court had distinctly held that the Federal Employers Liability Act only extended the Employers Liability where negligence was established.

This amendment of the Jones Act was a re-enactment of the Federal Employers' Liability Act and by so doing, Congress ratified and approved the many decisions limiting the masters liability thereby created to the precise language of the Act, i. e., where the action was founded on negligence.

The following cases were decided under the Federal Employers' Liability Act before the Jones Act of 1920 extended it to seamen.

In

Seaboard Air Line v. *Horton*, 233 U. S. 492, decided in 1913,

The United States Supreme Court held:

> "it was the intention of Congress to base the actions upon negligence only and to exclude responsibility of the carrier to its employee for defects and insufficiencies not attributable to negligence."
>
> "To hold that under the Statute the Railroad Company is liable for injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused is to take from the Act the words "due to its negligence." The plain effect of these words is to condition the liability upon negligence."

In

Southern Railway vs. *Gray*, 241 U. S. 333, 339, decided in 1916,

this court said in regard to the Federal Employers' Liability Act, reversing a judgment entered upon a verdict for the plaintiff:

> "Negligence by the railway company is essential to a recovery."

Negligence of the employer or of its officers, agents or employees is essential to a recovery.

When Congress in 1920 extended to seamen the right of action under the Federal Employers' Liability Act, it knew that the State and Federal Courts had consistently held for twelve years that this act only fastened liability on the employer for negligence.

The act itself is clear and unambiguous and bases liability solely on negligence. The decisions of the State and Federal Courts had clearly and without exception limited liability to cases of negligence.

If Congress had desired to give railroad employees or seamen or both a cause of action, for assault or any "misconduct" not amounting to negligence, it would have done so by the use of some appropriate language expressing such purpose, either in the Jones Act, or by amending the Federal Employers' Liability Act.

The decision of this court in International Stevedoring Co. v. Haverty, 272 U. S. 50, relied upon by the Court of Appeals as a controlling authority in this court in favor of the cause of action in the suit at bar does not sustain the Court of Appeals' ruling.

In the *Haverty* case, this court held that a stevedore, in loading or unloading a vessel plying in navigable waters, was performing a seaman's work and was therefore classed as a "seaman". This conclusion is founded on a historic review of seamen's duties, which establish that in former times, seamen performed the work of loading and unloading their vessels, from which fact, this court considered that the segregation of this duty to stevedores did not remove it from the category of seamen's work, and therefore, reached the conclusion that the men performing seamen's work were to be classed as seamen.

Following the same process of reasoning, in the instant case, discloses the error in the Court of Appeals' application of the Haverty decision to this case.

The word "assault" is of ancient and definite meaning. The word "negligent" is of less ancient, but no less definite meaning.

An "Assault" signifies a wilful or wanton trespass upon the body of another.

Negligence is the failure to exercise ordinary care whereby another is injured in his person or property.

Since common law times "Assault" has meant one thing and "negligence" has meant an entirely different thing.

The act of a stevedore, in loading or unloading a vessel was the same as the act of a sailor doing the same work and so he has been classed as a seaman in the doing of that work. But the act of committing an assault and the act or inaction constituting negligence, have never at common law been regarded as the same thing, but totally different things.

This court in the *Haverty* case applied the rule that

> "things equal to the same thing are equal to each other."

This court in classifying a stevedore performing seaman's work as a seaman, added nothing to the Statute. But the Court of Appeals has added to the Statute by inserting the word

> "misconduct",

If the Court of Appeals' decision stands the statute now reads:

> "Every common carrier * * * shall be liable in damages * * * for such injuries * * * resulting * * * from negligence (or misconduct.)"

so that by judicial extension of the Federal Employers' Liability Act a new liability is placed upon common carriers and the employer of seamen based on the misconduct of a co-employee.

That liability does not depend upon any classification, but solely upon judicial *ipse dixit* that Congress must have meant to create a right not mentioned in the act and therefore, the Court of Appeals has added it to the Statute.

Gabrielson v. Waydell, 67 Fed. Rep. 342, distinguished.

The Court of Appeals cites *Gabrielson* v. *Waydell*, 67 Fed. Rep. 342.

After the Court of Appeals had held that Gabrielson had no common law cause of action in negligence he brought suit in the Federal Court and there obtained a judgment. It should be noted that the Federal Court did not pass on any question of negligence, but based the recovery on Admiralty rules which require the owner to provide among other things a "seaworthy" vessel. The Court held that an incident of a "seaworthy" vessel, was to have it competently manned, and that the captain who assaulted Gabrielson was shown to be incompetent by reason of his brutal conduct.

This decision, in no way, indicates a ruling contrary to that of the Court of Appeals in the Gabrielson case.

It is not out of place to say that the prevailing opinion in the Gabrielson case in the Court of Appeals, is far less convincing than the dissenting opinion, which urges that the well established authority of the master of a vessel to use physical force in disciplining his crew, made the owner liable for a mis-use of this authority. It seems to counsel that, this authority to use force, should have subjected the defendant Waydell to liability.

However, although a longshoreman, while engaged in loading or unloading a vessel, is a seaman under the Hav-

erty decision, the employing stevedore and his foreman have not been vested with the authority of a master of a ship.

They have no express or implied authority to use force to keep longshoremen at work. So that in the case at bar, the respondent's case is not strengthened, even though the Court of Appeals' decision in the *Gabrielson* case should be overruled.

POINT II.

There is no evidence that the barge the longshoremen were loading was being used in connection with the loading or unloading of any vessel employing seamen, therefore, the defendant in error is not shown to have been engaged in seamen's work, and is not entitled to the benefits of the Federal Employers' Liability Act.

There is no historic background from which to infer that seamen are or even were employed on harbor barges towed around the harbor.

The merchandise was loaded and unloaded by longshoremen, used solely for that purpose. It does not appear, nor we submit can any inference be drawn, that this barge had any captain or crew.

The historical review which disclosed that longshoremen or those loading or unloading a vessel, were doing the work that sailors formerly did, finds no parallel in this case. The injured man was engaged in loading a barge which had no seamen or sailors upon it, and it does not appear that such barges ever carried seamen.

He was, doing mere longshoreman's work, unconnected with any vessel, employing seamen. Therefore, he is not entitled to the benefits of the Federal Employers' Liability Act, as made applicable to seamen.

POINT III.

The fact that the tort was committed on navigable water, and therefore is subject to the federal jurisdiction over maritime matters, does not make the Jones Act applicable.

The Court of Appeals said (229):

> "The cause of action having arisen upon the navigable waters of the United States, is to be disposed of under the principles of maritime law. (*International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *Northern Coal & Dock Co.* v. *Strand*, 278 U. S. 142; 49 Sup. Ct. Rep. 88; *Resigno* v. *Jarka Co. Inc.*, 248 N. Y. 225."

In determining that the maritime law applies, it is only necessary that the transaction arose on navigable water. In other words, it is a mere question of Federal jurisdiction.

But whether the plaintiff comes within the Jones Act depends upon the further fact, namely, was the injured man a "seaman".

A stevedore merely as such, is not a seaman. It is only when he is performing seaman's work that he is so classified.

In the decisions of this Court classifying a stevedore as a seaman, it has appeared:

> 1st:—That the action was founded on negligence.
>
> 2nd:—That the stevedore was performing a seaman's work, that is, loading or unloading a vessel which plied in navigable water, and in charge of seamen.

In the instant case, these two essential facts are missing.

There is no claim of negligence.

There is no proof that this barge was operated by seamen.

The barge was evidently to go to the Southern Pacific Co. (91-92). Louis Osborne testified (91-92):

> "Q. You saw the occurrence between Valentin and Curren? A. I was present at the time it happened.
>
> Q. At that time, where were you employed? A. I was a checker for the Southern Pacific Company at that time.
>
> Q. Have you ever been employed by Arbuckle Brothers? A. No.
>
> Q. Have you ever had any connection with them or any of their offices? A. No connection whatsoever.
>
> Q. Where were you at the time of this fracas? A. I was in charge of checking freight, that was loaded on the barge at that time."

The business of the Southern Pacific Company is a common carrier by rail and water (*Southern Pacific Co.* vs. *Jensen*, 244 U. S. 205).

In the case at bar, the Jones Act is invoked to make the master the employing stevedore, responsible for a willful assault by a foreman of a workman under him.

The Court of Appeals recognizes that at common law the master is not so responsible, but decides that because the plaintiff was a "Seaman" the master is made liable under the Jones Act.

In so doing, the Court of Appeals overlooks the fact that the decision of this Court merely decide that in actions based on negligence, the Jones Act classifies stevedores doing seamen's work, as seamen.

This court has never held that an employer stevedore, because he is loading a vessel, is the master of the ship. The employer of the stevedore not being the master of a ship has no authority or right to discipline his workmen

by use of physical force. Having no power to use physical force, the law cannot imply that he has delegated to the foreman authority to use force.

The Law cannot from the conventional relation of master and servant raise an implied delegation, by the master to a foreman of authority to commit an unlawful, in fact, criminal act.

Therefore although the maritime jurisdiction over the tort is established, the application of the Jones Act is not shown.

There is no claim that the master aided or abetted the assault, so there is no proof of personal liability. And the court cannot infer as a matter of law that authority to commit an unlawful and criminal act was delegated by the master to the foreman.

CONCLUSION.

The judgment should be reversed and the complaint dismissed.

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OCT 4 19

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1929.

No. 390.

INEZ M. JAMISON, WILLIAM N. DYKMAN, AND MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

AGAINST

VALENTIN ENCARNACION,

Respondent,

Answer and Respondent's Brief on Application for Writ of Certiorari.

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Supreme Court of the United States

OCTOBER TERM, 1929.

INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

AGAINST

VALENTIN ENCARNACION,

Respondent.

The Clerk will enter my appearance as counsel for the respondent.

JAMES A. GRAY,
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The Real Questions Involved.

1. Does the maritime law, by reason of the fellow servant rule, exempt an employing stevedore from liability for an assault by a foreman, who, in the scope of his employment and in furtherance of his master's business, assaults a longshoreman subject to his orders?

2. Does the reference by a state Court to a statute of the United States, as showing a legislative tendency, constitute such a construction of the statute as to present a question reviewable in this Court under Writ of Certiorari?

3. Was the petitioner, under the facts of the case and the opinion of the Court of Appeals, denied any right, privilege or immunity claimed or set up, under the laws of the United States?

Supreme Court of the United States

INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

AGAINST

VALENTIN ENCARNACION,

Respondent.

Answer to Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, Valentin Encarnacion, answering the petition of the above named petitioners for a Writ of Certiorari to be directed to the Supreme Court of the State of New York to review the determination of the Court of Appeals, the highest Court of the State of New York having jurisdiction in the premises, respectfully shows:

Petitioners' Alleged Questions Involved.

"FIRST" AND "SECOND."

None of the questions submitted by petitioner and alleged as involved herein are sustained by the record of the case and the opinion of the Court

of Appeals and question "Third," if sustained, would deprive this Court of jurisdiction to issue the writ.

The determination of the Court of Appeals, as clearly shown by the opinion, was that one engaged in a maritime service and assaulted by a foreman "in directing the performance of the work and intended and believed to be for the interest of the master" should not, on authority of a case decided by the same Court wherein there was a vigorous dissent, twenty-six years before, be deprived of a recovery, at trial term, for the injuries so received, because the foreman committing the assault and the plaintiff were claimed to be fellow-employees.

In reaching this conclusion, stress was laid, by *analogy and analogy* only, upon the "broad field in which Congress has disapproved and changed the (fellow servant) rule introduced into the common law within less than a century" and held "that Congress, doing away with the fellow servant rule in cases of *negligence* coming within the scope of its legislation, has left neither substance nor reason to our earlier decision and that it is no longer controlling."

It is respectfully submitted that the Court of Appeals, in deference to the rule of *stare decisis*, preferred to base its decision upon the changed condition of industry and the trend of legislation regarding industrial employment "to establish (in its own state) a better rule of conduct and give place to a higher degree of justice" rather than to declare its former decision erroneous.

The Real Questions Involved:

1: Does the maritime law, by reason of the fellow servant rule, exempt an employing stevedore from liability for an assault by a foreman, who, in the scope of his employment and in furtherance of his master's business, assaults a longshoreman subject to his orders?

2: Does the reference by a State Court to a statute of the United States, as showing a legislative tendency, constitute such a construction of the statute as to present a question reviewable in this Court under Writ of Certiorari?

3: Was petitioner, under the facts of the case and the opinion of the Court of Appeals, denied any right, privilege or immunity, claimed or set up, under the laws of the United States?

To sustain respondent's contention in this behalf it is only necessary to briefly review the record, thus ascertaining the course of the litigation and the actual determination of the trial Court, the intermediate appeal to the Appellate Division wherein the judgment of the Trial Term was reversed and the final opinion and judgment of the Court of Appeals reversing the judgment of the Appellate Division and affirming the judgment of the Trial Term.

Facts.

Plaintiffs' action was at common law for an assault upon the plaintiff by a foreman or superintendent of an employing stevedore, alleged to have been delegated by defendant to give orders to plaintiff, while both mere engaged in the defendant's service on a barge lying in navigable waters (Plaintiffs' Complaint, fols. 14, et seq.).

The trial Judge allowed a recovery if the jury found the assault was committed in furtherance of

the master's work, was "unprovoked" and were "such as are incident to the performance of the duties entrusted to the foreman" (Charge of Court, fol. 138).

> "The evidence permitted the conclusion that a gang boss or foreman assaulted an employee who was subject to his orders; and the verdict of the jury, under the charge of the learned trial Justice, found the employing stevedore liable for this assault, upon the theory that the same was committed *'in furtherance of the master's work'*" (Op. App. Div., fols. 181, 182).

The only exception, at trial term, was at the end of the whole case and is found at folio 134 as follows:

> "Mr. Hill: I move to dismiss the complaint on the ground that it appears affirmatively that the act complained of was that of a fellow servant acting outside the scope of his employment.
>
> The Court: Denied.
>
> Mr. Hill: Exception."

There were neither exceptions to the statement of the law by the learned trial Justice or requests for additional instructions by counsel for either party (fol. 146).

The learned Appellate Division, solely upon the authority of the case of *Gabrielson* v. *Waydell*, 135 N. Y. 1, held the foreman and employee "fellow servants," reversed the judgment of trial term and dismissed the plaintiffs' complaint.

On appeal to the Court of Appeals the appellant there and the respondent here vigorously attacked the case of *Gabrielson* v. *Waydell* (supra), as being contrary to the weight of authority when

decided and, certainly, not now in consonance with the liberal view of Congress and of both the State and Federal Courts with regard to what has been denominated the "fellow servant rule."

The Court of Appeals thereupon said:

> "Reading Gabrielson v. Waydell (supra), in the light of the Merchant Marine Act and its history, we do not hesitate to say that the authority of the case as a rule of maritime law has been largely, if not fully spent; that we should not waste time in pointing out distinctions between negligence and misconduct in this connection in order to defeat plaintiffs' recovery but should hold broadly that Congress in doing away with the fellow servant rule in cases of *negligence* coming within the scope of its legislation, *has left neither substance nor reason to our earlier decision and that it is no longer controlling.* We cannot, with a fair countenance, say that the master is now liable to his servants for personal injuries due to a careless foreman but is not liable for personal injuries inflicted on them by a brutal foreman in directing the performance of the work and intended and believed to be for the interest of the master. (Mott v. Consumers Ice Co., supra.)"

The latter Court reversed the judgment of the Appellate Division and affirmed that of the trial term.

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Supreme Court of the United States

OCTOBER TERM, 1929.

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Petitioners,

AGAINST

VALENTIN ENCARNACION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The respondent, a longshoreman, in the employ of the defendant, a stevedore, while engaged in loading a barge on the navigable waters of the United States, was assaulted by the foreman to whose orders he was subject.

The assault was found by the jury to have been made within the scope of the foreman's employment and in furtherance of the master's business.

Respondent had judgment in the Trial Court.

The Court of Appeals affirmed such judgment.

The only exception in the record was to the refusal of the Trial Court to dismiss the complaint upon the ground that the foreman and plaintiff were fellow servants.

The sole question considered and decided by the Court of Appeal was whether the employing stevedore was exempted from liability for the assault, by reason of the common employment of the foreman and longshoreman. This question was decided in the negative and the judgment affirmed.

POINT I.

The fellow servant rule, by the weight of authority, has no application in actions for assault and battery.

In 26 Cyc. 1531, supported by a large array of authorities, it is said:

> "In respect to other torts committed by the servant there can be no question but that the master is liable, at the present day, for an assault, false arrest and imprisonment, malicious prosecution, trespass, conversion or a libel, by his servant in the scope of his employment."

The New York rule is well stated in *Mott* v. *Consumers Ice Co.*, 73 N. Y. 543. It is that:

> "For the acts of a servant, within the general scope of his employment, while engaged in his master's business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly or even willfully. * * * But if a servant goes outside his employment and without regard to his service, acting maliciously, or in order to effect some purpose of his own, wantonly commits a trespass, or causes damage to another, the master is not responsible." (Quotation from *Girvin* v. *N. Y. C. & H. R. R. Co.*, 166 N. Y. 289).

The same rule is re-asserted in *Magar* v. *Hammond*, 183 N. Y. 387; *Craving* v. *Bloomingdale*, 171 N. Y. 439; and many other cases. *Mott* v. *Consumers Ice* (supra), is given great weight in

the decision now under consideration (see Opinion).

Under the Compensation Law of the State the scope of employment has frequently been before the Court.

A typical case, and on facts somewhat similar to the instant case, is *Knocks* v. *Metal Packing Corporation*, 231 N. Y. 778.

Judge Chase, writing for the Court says:

> "The foreman's duty as such to exercise reasonable discipline over the employees of the factory made possible a lack of discretion in performing such duty. The assault by the foreman was incidental to his employment as such. It grew out of his performance of his duty as foreman for the employer. It cannot be said as a matter of law or fact that the foreman who up to the moment of the assault was properly engaged in the performance of his duty to his employer at that moment abandoned his duty and indulged in the assault as an individual act.
>
> The employer should be responsible for an excitable and violent foreman in the prosecution of his duties as such, at least until there is sufficient interruption in the performance of such duties as to justify the conclusion that the foreman had abandoned his employment and that the assault was an independent and individual act, as distinguished from acts within the terms of his employment."

See, also, to same effect, *Burke* v. *Towner Brothers*, 203 App. Div. 384; *Distefano* v. *Standard Ship Building Co.*, 203 App. Div. 145; *Fried* v.

Quinlan, 242 N. Y. 496; *Rydeen* v. *Monarch Furniture Co.*, 240 N. Y. 295.

The rule in the Federal Courts seems to be somewhat broader.

Beginning with *Philadelphia and Reading R. R. Co.* v. *Derby*, 14 How. 468, the syllabus reads:

> "A master is liable for the tortious acts of his servant, when done in the course of his employment, although they may be done in disobedience of the masters orders."

Assault as a tortious act, is not specifically mentioned, but it is included. *Memphis & Newport Packet Co.* v. *Hill*, 122 Fed. 246. *The General Rucker*, 35 Fed. 157; *Ramsden* v. *Boston, etc., R. R. Co.*, 104 Mass. 120; *Craker* v. *Chicago, etc., R. R. Co.*, 36 Wisconsin 675.

This general statement of liability for acts done in the scope of employment is recognized in *Davis* v. *Green*, 260 U. S. 349, in the following excerpt from the opinion of Mr. Justice Holmes:

> "But neither allegation nor proof present the killing as done to further the master's business or as anything but a wanton and wilful act done to satisfy the temper or spite of the engineer. * * * The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey. In other words he did a wilful act wholly outside his employment, while his employment was going on."

In the case at bar both allegations and proof present the assault as done, both in the course of employment and to further the master's business and the Appellate Division, while reversing

the judgment on the ground of fellow employment, unanimously approved the finding of the jury in that regard.

The Court of Appeals, upon the same ground says:

> "We can not, with a fair countenance, say that the master is now liable to his servants for personal injuries due to a careless foreman but is not liable for personal injuries inflicted on them by a brutal foreman in directing the performance of the work and intended and believe to be for the interest of the master" (fol. 241).

In an earlier part of the opinion and at folios 228, et seq., the Court had said:

> "The Appellate Division reversed, applying the fellow servant rule and holding that there was no liability on the part of the employer even though the foreman inflicted the injuries when he was engaged in hurrying up the work in obedience to the employers orders."

We are now confronted by the query: Does the fellow servant rule apply?

This question has just been answered in a learned and comprehensive opinion by Circuit Judge Swan, concurred in by Circuit Judges Manton and Augustus N. Hand, not yet reported, in *Cain, Plaintiff-Appellee* v. *Alpha S. S. Corporation, William Walker and Frank Daly, copartners doing business under the firm name of Walker & Daly, Defendants-Appellants,* and answered in the negative.

It is not the purpose of Counsel to analyze this opinion or to quote extensively, if at all,

from it, but suffice it to say that a majority of the authorities cited and considered in the opinion of Judge Swan were before the Court of Appeals in the present case and while the two Courts travelled by different paths they converged at the destination.

The Circuit Court of Appeals was not confronted by its own decision to the contrary but was considering the case as one of first impression.

The facts, however, of the two cases are somewhat different.

In the cited case it could readily, upon plaintiff's own testimony, have been said that Cain was punished for a previous dereliction of duty, his tardiness in over-sleeping.

In our case the evidence justifies the inference, that the foreman, in an effort to carry out his orders to keep the men busy, assaulted plaintiff, an employee and subject to his orders, to force him to hurry up with the work in which he was engaged. There is no suggestion of punishment for a previous default but a present assault committed to accelerate the work then being done, which acceleration was carrying out the orders of the master and to further his business and interest.

This would seem to make the instant case much stronger in the fundamental fact of scope of employment. *Davis* v. *Green* (supra).

But be that as it may the cited case is as authoritative on the non-application of the fellow servant rule in the instant case, as the dignity and prestige of the Circuit Court can make it.

If a case must be made under the doctrine of respondent superior as intimated in *Davis* v. *Green* (supra), and decided in *Cain* v. *Alpha S. S. Corporation, et al.* (supra) our case is made out beyond peradventure.

Nor are we deprived of our recovery by reason of the fellow servant rule.

The research of the Circuit Court of Appeals in the Cain case revealed but two cases in which the rule had been discussed as to its applicability to a wilful assault, one of which was *Memphis & Newport Packet Co.* v. *Hill,* 122 Fed. 246 (CCA 8), already referred to and *Gabrielson* v. *Waydell,* 135 N. Y. 1.

The former case rejected the rule and the latter is overruled by the decision which it is sought to bring before this Court by the petition herein.

It is conceded that it was overruled chiefly by reference to congressional legislation, but it is submitted and confidently urged that such reference was by analogy only and the Circuit Court says, and it is true, that "the statutes may appropriately be referred to as showing the legislative tendency." Besides, if the conclusion is right the reasoning by which it was reached is not a ground of error.

While maritime authority is lacking upon the applicability of the rule in cases of assault by servants of the same grade, there are cases both at common law and in admiralty where both Federal and State Courts have refused to apply the rule where the act was committed by one having authority over the other.

In the dissenting opinion in *Gabrielson* v. *Waydell* (supra), Judge Maynard quoted with approval, *Wood on Master and Servant,* Sec. 864, as follows:

> "If he (the master) places a servant in a position of authority over other servants, and makes the inferior servant subject to the direction and control of the superior, while he is not chargeable for the consequences of directions given by such superior

> servant within the scope of the general employment, yet there is no reason why he should not be chargeable to a co-servant for an abuse of such authority as much as he would be to a stranger."

In a case between the same parties, *Gabrielson* v. *Waydell,* brought in the Federal Court after a discontinuance in the State Court succeeding the reversal and direction of a new trial by the Court of Appeals, the Federal Court, 67 Fed. 342-345, said:

> "Actions upon the liability of principals for the acts done by agents placed over others are of comparatively modern origin, although the principles underlying them are fundamental; and these principles may have slept, for want of being brought into application, as well in this class of cases as others."

In *Cain* v. *Alpha S. S. Co., et al.* (supra), Judge Mack at trial term said:

> "The liability of the defendant in this case is based upon the ship owner's responsibility for the acts of the second engineer in relation to a seaman's acts done, in the jury's opinion, in the course of his duty as the superior of the seaman, and thus representing the owner and not in his personal capacity out of personal spite or malice. * * * In my opinion the fellow servant rule has no application."

In *Memphis & Newport Packet Co.* v. *Hill,* 122 Fed. 246 heretofore referred to, the syllabus is:

> "A deckhand on a steamer who has been selected by an officer in command to act as

> captain of the watch and to exercise authority and control over other deckhands, is, for the time being, an officer of the vessel and the owner cannot avoid liability for an assault committed by him upon another deckhand while so acting, on the ground that the two were fellow servants."

In *Kennedy* v. *Cunard S. S. Co., Ltd.*, 197 App. Div. 459, 467, aff. 235 N. Y. 604, it was held:

> "The foreman in this case directed the work in the three hatches; the men took their orders from him and applied to him for tackle and other appliances used in their work; it was he who gave the order to close the hatches. He was not a fellow servant but was the *alter ego* of the master."

In the "Sinaloa" 292 Fed. 640 where sailors upon a foreign vessel being operated by American citizens were subjected to abuse and one assaulted by the mate by the captain's orders and he and another were ordered from the ship, wages were held recoverable and the assaulted seaman was held entitled to recover for the assault.

In a somewhat similar situation in *The Rolph*, 293 Fed. 269, aff. 299 Fed. 52, sailors who were assaulted by a brutal mate were allowed to proceed in rem against the vessel, notwithstanding Admiralty Rule 16 and were awarded indemnity for their injuries.

In neither of these cases could indemnity have been recovered had the fellow servant rule applied in actions for assault.

In non-maritime cases in the State Courts, no case has been found where the fellow servant rule has been applied although several specifically repudiate it.

In *Richard* v. *Amoskeag Mfg. Co.,* 109 Atlantic 88, the Supreme Court of New Hampshire sustained a judgment against an employer obtained by an employee for an assault by his immediate superior.

The Court said:

> "The same principle is applicable when the assaulted party is a co-employee and not what is termed a third party."

In *Flemming* v. *Tarboro Knitting Mills,* 161 N. C. 436, the master was held liable for an assault by the foreman upon an employee working under him.

Lamb v. *Littman,* 128 N. C. 361, sustained a judgment wherein the injury was caused by the violent handling of the plaintiff by defendant's alter ego, in urging him to the proper performance of his work.

Alabama has given effect to the same principle in *Avondale Mills* v. *Bryant,* 10 Ala. App. 514 and *Jabeles Colias Conf. Co.* v. *Booze,* 181 Ala. 459, as has the Dominion of Canada in *Hudson Bay Co.* v. *Vaillancourt,* 2 Dom. L. R. N. S. 1008.

The Supreme Court of Mississippi has seemingly strained the scope of employment by extending the rule to a foreman who assaulted an employer in an attempt to prevent a strike. *Aldin Mills* v. *Pendergraft,* 115 So. Rep. 713.

Other cases bearing upon the principle have been noted and commented upon by Judge Swan in the *Cain* case. The foregoing, however, are sufficient to show the general trend of the Courts and to sustain the assertion of Judge Mack in the trial Court in the last named case that the decision of the Appellate Division in the instant case is contrary to the weight of authority.

Furthermore the very essence of the fellow servant rule is the assumption of risk the employee

takes that those with whom he is called upon to work may become careless in the performance of work causing injury to his fellow and such risk is reflected in the compensation he receives for his work.

This is not true with the extraordinary risk of being assaulted or mistreated by one placed in authority over him. His contract of employment, from its very nature, implies a covenant of decent and humane treatment and public policy requires its fulfillment. The days of physical violence, as a means to hurry up work, passed in this country with the institution of slavery and nothing has since occurred in the moral or civil code to revive it.

The determination of the Court of Appeals that the trial Judge committed no error in denying the defendant's motion to dismiss the complaint upon the ground that plaintiff and his foreman were fellow servants was correct.

POINT II.

Reference to the trend of legislation culminating in the enactment, by Congress, of a certain statute, is not a construction of the statute justifying review by Writ of Certiorari.

It is matter of common knowledge that the Employers' Liability Act (35 Stat. ch. 149, sec. 1) abrogated the fellow servant rule, restricted the defense of contributory negligence and assumption of risk and extended liability to cases of death. *Minn. &c. R. R. Co.* v. *Rock*, 299 U. S. 410.

This was accomplished by creating liability for "injury or death resulting in whole or in part

from the negligence of any of the officers, agents or employees of such carrier," thus placing the negligence of a co-employee upon the same basis as that of the employer.

The Merchant Marine Act (3 Masons U. S. Code Tit. 46, Chap. 18, Sec. 668, p. 3273) extended to seamen who shall suffer injury in the course of their employment the rights and remedies given by Congress to railroad employees.

This Court in *Panama R. R. Co.* v. *Johnson*, 264 U. S. 365, held that "its origin, environment and subject matter show that it is intended to and does bring the rules to which it refers into the maritime law."

In *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, the Act was held to include longshoreman within its provisions.

Thus, as stated by Mr. Justice Holmes in the last named case "has Congress disapproved and changed the (fellow servant) rule introduced into the common law within less than a century."

Congress, in the successive Acts relating to such rule and the Courts in construing them have treated the rule as applicable only in personal injury to an employee resulting from negligence.

Is it not, therefore, a plausible inference that it never, even at common law, extended beyond injury from negligence and therefore never included, in its application, injury by assault by one employee upon another?

Particularly persuasive of this conclusion is the manner of its abrogation above referred to, to-wit, creating a liability for injury or death where none had before existed "resulting in whole or in part from the negligence of any * * * employees * * *."

It was this trend of legislation to which the Court of Appeals referred and upon which it held that the authority of its former decision "as a rule of maritime law has been largely, if not fully, spent."

What better authority could be asked or found for declaring that there is left "neither substance nor reason to our earlier decision and that it is no longer controlling?"

The effort of petitioner to ascribe to the Court of Appeals a construction of the Employers Liability Act or the Merchant Marine Act imposing liability under both or either for the assault in this case is abortive.

It only held that a previous determination by the same Court was erroneous and refused to exempt, under its authority the defendant from liability because of an alleged rule, "which in its restricted scope has not escaped criticism and has by statute frequently been curtailed or abolished. *"Alpha S. S. Corp., et al.* v. *Cain* (supra)." Only this and nothing more.

No where in the opinion by specific statement or clear intimation, is it held that the Employer's Liability Act applies to assault.

The record of the trial Court resulting in the judgment affirmed contained but one exception, that of denial of defendant's motion to dismiss the complaint upon the ground that the plaintiff and foreman were fellow servants, and the Court of Appeals was powerless to decide anything else and did not do so.

Such decision does not present a substantial or, in fact any construction of the Employer's Liability Act in relation to exemption of the defendant from liability thereby.

POINT III.

The petitioner, under the facts of the case and the determination of the Court of Appeals, was not denied any right, privilege or immunity claimed or set up under the laws of the United States.

Certainly there is no statute of the United States which exempts the defendant from liability because the foreman and the assaulted party were in the same employ.

The action is in personam and no restriction other than that it shall be so brought is contained in any rule of the Courts of the United States.

His right, privilege and immunity, then, if any exists, must be found in his exemption, under the maritime law, by virtue of the application of the fellow servant rule.

That no such exemption exists is, we think, thoroughly established by the admittedly incomplete and rambling memorandum above.

Petitioners' Third Alleged Question.

If this Court has jurisdiction to grant the Writ of Certiorari herein it is because a substantial Federal question is involved. Such question does not arise unless the tort was in every sense maritime. If any of the elements of a maritime tort, the contract, the work or the locality is lacking, then the matter is of local concern, the Court is without jurisdiction and the petition must be dismissed.

Conclusion.

If the Court entertains the petition the Writ should be denied.

1st. Because the determination of the Court of Appeals contravenes no principle of maritime law.

2nd. Because there was no construction of any statute of the United States.

3rd. Because the defendant was not denied any right, privilege or immunity claimed or set up under the laws of the United States.

Respectfully submitted,

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APR 12 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1929.

No. 390.

INEZ M. JAMISON, WILLIAM N. DYKMAN AND MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

AGAINST

VALENTIN ENCARNACION,

Respondent.

RESPONDENT'S BRIEF.

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OCTOBER TERM—1929.

No. 390.

INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GOETZINGR, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

AGAINST

VALENTIN ENCARNACION,

Respondent.

RESPONDENT'S BRIEF.

On Certiorari to the Supreme Court of the State of New York.

Statement.

The action was brought in the Supreme Court, Kings County, against an employing stevedore to recover damages for an assault upon plaintiff, a longshoreman, made by the foreman of the defendant to whose orders plaintiff was subject.

The assault was made within the scope of the foreman's employment and in furtherance of the defendant's business.

At the end of the whole case, at trial term, defendant, at folio 134 moved as follows:

> "Mr. Hill: I move to dismiss the complaint on the ground that it appears affirmatively

that the act complained of was that of a fellow servant acting outside the scope of his employment.

The Court: Motion denied.

Mr. Hill: Exception."

There was neither exception to the charge of the learned trial Justice or request for additional instructions by counsel for either party.

The jury found a verdict for the plaintiff in the sum of Twenty Five Hundred ($2500) Dollars (fols. 31-33) upon which judgment was entered (fol. 35).

The Appellate Division, approving the facts found by the jury, reversed the judgment upon the law and dismissed the complaint upon the sole ground that the plaintiff and the foreman, to whose orders he was subject, were fellow servants.

In so doing, the Appellate Division was guided by the rule established in New York in the case of *Gabrielson* v. *Waydell,* 135 N. Y. 1, decided by a divided Court, with strong dissent, in 1892.

Pending the appeal to the Court of Appeals, it having been brought to the attention of the Court, that William A. Jamison, the sole defendant, had died while the appeal to the Appellate Division was *sub judice* in the latter Court, and, in such situation, under the Civil Practice Act, the action not abating, the Court of Appeals substituted, by proper amendment, the petitioners in place and stead of the said William A. Jamison and ordered that the action proceed against them.

The Court of Appeals reversing the Appellate Division and reinstating the judgment of trial term said: "Reading *Gabrielson* v. *Waydell*

(supra) in the light of the Merchant Marine Act and its history, we do not hesitate to say that the authority of the case as a rule of maritime law, has been largely, if not fully, spent; that we should not waste time in pointing out distinctions between negligence and misconduct in this connection in order to defeat plaintiff's recovery but should hold broadly *that Congress, in doing away with the fellow servant rule in cases of negligence coming within the scope of its legislation, has left neither substance nor reason to our earlier decision and that it is no longer controlling. We cannot, with a fair countenance, say that a master is now liable to his servants for personal injuries due to a careless foreman but is not liable for personal injuries inflicted on them by a brutal foreman in directing the performance of the work and intended and believed to be for the interest of the master*" (fols. 240-241).

In thus deciding, the Court neither construed the Federal Employers Liability Act nor extended the terms of that act to include assault.

On the remittitur of the Court of Appeals the judgment of trial term for $2,638.05 was reinstated and affirmed as of the original date of entry and judgment for costs in the Appellate Division and Court of Appeals amounting to $325.55 was awarded and entered.

This Court on October 21, 1929, granted a Writ of Certiorari to the Supreme Court of the State of New York the Court in which the record was filed and ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition, be treated as though filed in response to such writ.

Facts.

The facts are meagre but were sufficient to satisfy the jury and the Appellate State Courts, that the plaintiff a longshoreman while in the employ of the defendant, and subject to the orders of the foreman, was assaulted by the latter and the injuries were inflicted while the foreman was acting within the scope of his employment and in furtherance of the master's business.

The assault is testified to by the injured man as follows (45):

"Q. What kind of work were you doing? A. Stevedore.

Q. What kind of stevedoring work were you doing? A. Everything.

Q. Were you loading or unloading barges? A. Loading barges.

By the Court:

Q. What did he say? A. He called me and said, 'Hurry up, you black bastard son-of-a-bitch.'

By Mr. Castellano:

Q. And what did you say to him? A. I said, 'Leave me alone today. I am here for four or five years and I can do the work and I know what work to do.'

Q. And what did he say then? A. He give me a punch and I fall down.

Q. Where did he punch you? A. Right in my eyes.

Q. Right over your eyes? A. Yes, sir.

Q. Which eye? A. Right here (indicating) and I fall down to the floor."

The gang of which the plaintiff was one, was loading a barge which lay in the East River at

the foot of Jay Street, Brooklyn at the defendant's place of business. The plaintiff also testified:

> "Q. On May 19, 1925, were you working on barge No. 3? A. Yes.
>
> Q. And was that barge in the river? A. Yes, sir.
>
> Q. At the foot of Jay Street, Brooklyn? A. Yes" (fol. 42).

POINT I.

A master is liable for the tortious acts of his servant, when done in the course of his employment.

This Court, as early as the case of *Philadelphia & Reading R. R.* v. *Derby*, 14 Howard 468, gave expression to the general principle in the following language:

> "The rule of 'respondent superior' or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of the servant's employment."

Some years later in *Denver and Rio Grande Ry. Co.* v. *Harris*, 122 U. S. 610, it was applied in an illegal and wrongful assault upon the person of one Harris made by the defendant corporation "acting by its agents and servants." The Court

held the liability of the corporation, *civiliter*, to be the same as though it were a natural person.

It may, therefore, be deemed as settled that an assault is a "tortious act" as used by the Court in *Derby's* case (supra).

This rule was recognized as the law in *Davis* v. *Green*, 260 U. S. 349, brought under the Employers' Liability Act, but, as said by the Court of that case, "neither allegation nor proof present the killing as done to further the master's business or as anything but a wanton and wilful act done to satisfy the temper or spite of the engineer."

The rule, in the State of New York, as stated in the opinion of the Court of Appeals herein, was given effect in *Mott* v. *Consumers Ice Co.*, 73 N. Y. 543, 547, and followed innumerable times since that case.

The general rule prevailing in cases other than negligence is set forth in 26 Cyc 1531 supported by a long array of cases and is stated as follows:

> "In respect to other torts committed by the servant there can be no question but that the master is liable at the present day, for an assault, false arrest and imprisonment, malicious prosecution, trespass, conversion or a libel, by his servant in the scope of his employment."

The law as to what constitutes scope of employment is well illustrated in numerous cases construing these words as used in the Workmen's Compensation Law of New York. Probably the leading case is *Knocks* v. *Metal Packing Corporation*, 231 N. Y. 78, 83.

Judge Chase, writing for the Court says:

> "The foreman's duty as such to exercise reasonable discipline over the employees of the factory made possible a lack of discretion in performing such duty. The assault by the foreman was incidental to his employment as such. It grew out of his performance of his duty as foreman for the employer. It cannot be said as a matter of law or fact that the foreman who up to the moment of the assault was properly engaged in the performance of his duty to his employer at that moment abandoned his duty and indulged in the assault as an individual act.
>
> The employer should be responsible for an excitable and violent foreman in the prosecution of his duties as such, at least until there is sufficient interruption in the performance of such duties as to justify the conclusion that the foreman had abandoned his employment and that the assault was an independent and individual act, as distinguished from acts within the terms of his employment."

Having referred to the law as declared by this Court, by the Courts of the State of the State of New York and as reported in the cyclopedias to be of universal application, it may not be doubted that, at trial term, this case was properly disposed of, *unless an assault by one servant upon another in the same employ and subject to his orders, constitutes an exception to the law prevailing in all other relations between individuals.*

The decision under review did not recognize such an exception and we believe it has not been, heretofore, given support by the Courts, save in isolated, ill-considered instances.

POINT II.

The application of the so-called Fellow Servant Rule, in cases of assault, especially by one in authority upon another subject to his orders, is contrary to public policy and should not receive the sanction of the Court of last resort.

The Court of Appeals very properly stated "The cause of action having arisen upon the navigable waters of the United States, is to be disposed of under the principles of the maritime law."

If this were not true, this Court would be without jurisdiction to review the decision and the Writ of Certiorari would not have been granted.

By way of parenthesis, it will be contended under a subsequent point, that notwithstanding that the case is maritime in its nature and all the essential elements of jurisdiction, in the Court of original jurisdiction, are present and no others (*London Guarantee & A. Co.* v. *Industrial Ac. Co.*, 279 U. S. 109) the additional element necessary to confer jurisdiction here, *that the petitioner has been denied any right, privilege or immunity claimed or set up under the laws of the United States, is absent.*

The public policy of any state or nation must be and is reflected by the acts of its governing body and declared by its authorized tribunals.

As stated by the Court of Appeals in the opinion, the main argument advanced to the Court against following its own decision of more than

a third of a century ago, in *Gabrielson* v. *Wardell*, 135 N. Y. 1, was "to establish a better rule of conduct and give place to a higher degree of justice" and an effort was made to impress upon the Court, as Mr. Justice Pound says, that the authority of cases of first impression much more recent than the *Gabrielson* case, had been disregarded "in order to conform the decisions of the Court to the actualities of industrial life."

What is more natural than that both counsel and the Court, in the consideration of a purely maritime question in that behalf, should depend for both guidance and inspiration upon the Acts of Congress and the expressions of this Court?

Likewise reference was made to the activities of the Legislature of the State of New York and the decisions of the Court of Appeals of that State during the lapse of time since 1892, the date of the decision of the *Gabrielson* case, during which time the entire policy of the state as to the relation of master and servant had been changed.

The very names with which this relationship had been formerly identified had been expurgated and the reference in later statutes and decisions had been not to "master and servant" but to "employer and employee."

The Legislatures of most of the states, animated by and following Congress in its policy "directed to the safety of the men and to making compensation for injuries as properly part of the cost of the business," have not been laggard in doing likewise.

We have now, in practically every department of government, national and state, some system of compensation for personal injuries sustained by employees, within the scope of their employ-

ment, in which the negligence of employer or fellow employee plays no part.

The last system of the law into which it was, in any form, introduced was the maritime law.

The first gesture in that direction by statute, was the Seamen's Act of March 4, 1915 (38 Stat. Chap. 153, Sec. 20) where it was provided: "That in any suit to recover damages for *any injury* sustained on board vessel or in its service, seamen *having command* shall not be held to be fellow servants with those under their authority."

If the doctrine of "superior servant" had never before been recognized in the maritime law (as to shore employees see *U. P. R. R. Co.* v. *Fort*, 17 Wall 553) it was here, by duly constituted authority, imported into it in cases of "seaman on board vessel or in its service." A national policy was thus declared by the governing body of the nation so far as seamen were concerned.

In *Chelentis* v. *Luckenback S. S. Co.*, 247 U. S. 372, Mr. Justice McReynolds said:

> "Section 20 of the Seamans Act declares: 'Seaman having command shall not be held to be fellow servants with those under their authority; and full effect must be given this whenever the relationship between such parties becomes important.'"

Subsequently, Section 33 of the Merchant Marine Act (Masons Code, Sec. 688, Pg. 3273) was, by amendment, substituted for Section 20 of the Seamen's Act.

The purpose of this substitution was to extend rather than restrict and limit the rights and

remedies of seamen suffering personal injury or death in the course of their employment.

Such is the effect given the amendment in *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375 and all the cases under the Act since decided by this Court.

One of the primary purposes of the amendment, following the *Chelentis* case, supra, was to extend the full indemnity rule of the shore servant to the servant upon the navigable waters.

That such amendment has been at all times liberally construed, so as to give expression to the full intent of Congress, has been fairly illustrated in the case of *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, where Mr. Justice Holmes said:

> "We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship."

In another part of the opinion it is said:

> "It is not disputed that the statutes do away with the fellow servant rule in the case of personal injuries to railway employees."

Again:

> "In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of opinion that a wider scope should be given the words of the Act * * *."

If the construction of the Seaman's, the Merchant Marine or the Employer's Liability Act was involved in this proceeding, would it be an extravagant claim to contend, in the "wider scope (which) should be given the words of the Act," the word "negligence," used in the latter, applying both to employers and co-employees, be construed as including the "misconduct" of the latter within the scope of the employment?

But the construction of neither of these statutes is in any way involved.

They were referred to, as was perfectly proper, both in the argument of counsel and the opinion of the Court of Appeals which reference and its effect will be considered under another point of this brief.

Congress, in the successive Acts relating to such rule and the Courts in construing them, have treated the rule as applicable only in personal injury to an employee resulting from negligence. The few cases in this Court where an assault, by one servant upon another in the same employ, have been considered and disposed of without reference to the relationship of fellow servants. *Davis* v. *Green*, 260 U. S. 349, *Atlantic Coast Line R. R. Co.* v. *Southwall*, 275 U. S. 64.

Is it not, therefore, a plausible inference, that the fellow servant rule never extended beyond injury from negligence and therefore never included, in its application, injury by an assault by one employee, acting within the scope of his employment, upon another who was subject to his orders?

That was the position taken by Judge Maynard of the New York Court of Appeals and concurred

in by Judges Finch and O'Brien in the dissent in the *Gabrielson* case (supra).

On page 22 of respondent's brief it is said:

> "It is not out of place to say that the prevailing opinion in the Gabrielson case in the Court of Appeals, is far less convincing than the dissenting opinion, which urges that the well established authority of the master of a vessel to use physical force in disciplining his crew, made the owner liable for a misuse of this authority. It seems to counsel, that this authority to use force, should have subjected the defendant Waydell to liability."

Counsel for respondent, through his long friendship for his adversary, has extreme satisfaction in complimenting him upon this, the only paragraph in his rather extended brief, that seems at all relevant to the question to be determined by this Court.

Judge Maynard seems to have based his argument largely upon Wood on Master and Servant, Sect. 864 which provides:

> "If he (the master) places a servant in a position of authority over other servants and makes the inferior servant subject to the direction and control of the superior, while he is not chargeable for the consequences of directions given by such superior within the scope of the general employment, yet there is no reason why he should not be chargeable to a co-servant for an abuse of such authority as much as he would be to a stranger."

In a case between the same parties, *Gabrielson v. Waydell*, brought in the Federal Court after a discontinuance in the State Court, succeeding

the reversal and direction of a new trial by the Court of Appeals, the Federal Court, 67 Fed. 342-345, said:

> "Actions upon the liability of principals for the acts done by agents placed over others are of comparatively modern origin, although the principles underlying them are fundamental; and these principles may have slept, for want of being brought into application, as well in this class of cases as others."

In the very recent case of *Cain* v. *Alpha S. S. Corp., et al.,* in the District Court of the U. S. for the Southern District of New York, now before this Court, Judge Mack says:

> "As to the law, I am unable to follow the Gabrielson case, 135 N. Y. 1, even though it be still regarded as the law of New York (Encarnacion v. Jamison, 230 N. Y. Supp. 16, 1928).
>
> * * * Furthermore in holding that a principal is never liable for wilful and unjustifiable assault by his agent, it is contrary to the weight of authority. * * * In my judgment the fellow servant rule has no applicability."

On appeal to the Circuit Court of Appeals Judge Mack's position was unanimously sustained. Judge Swan, of that Court, writing an opinion which was conservative, logical and forceful, every sentence of which can be endorsed without doing violence to any of the prior rulings of this Court.

In *Memphis & Newport Packet Co.* v. *Hill,* 122 Fed. 246, the syllabus is:

> "A deckhand on a steamer who has been selected by an officer in command to act as captain of the watch and to exercise au-

thority and control over other deckhands, is, for the time being, an officer of the vessel and the owner cannot avoid liability for an assault committed by him upon another deckhand while so acting, on the ground that the two were fellow servants."

In the "Sinaloa" 292 Fed. 640, where sailors upon a foreign vessel, being operated by American citizens, were subjected to abuse and one assaulted by the mate by the captain's orders and he and another were ordered from the ship, wages were held recoverable and the assaulted seaman was held entitled to recover for the assault.

In a somewhat similar situation in The Rolph, 293 Fed. 269, aff. 299 Fed. 52, sailors who were assaulted by a brutal mate were allowed to proceed in rem against the vessel, notwithstanding Admiralty Rule 16 and were awarded indemnity for their injuries.

In neither of these cases could indemnity have been recovered had the fellow servant rule applied in actions for assault.

In non-maritime cases in the State Courts, no case has been found where the fellow servant rule has been applied although several specifically repudiate it.

In *Richard* v. *Amoskeag Mfg. Co.*, 109 Atlantic 88, the Supreme Court of New Hampshire sustained a judgment against an employer obtained by an employee for an assault by his immediate superior.

The Court said:

"The same principle is applicable when the assaulted party is a co-employee, and not what is termed a third party."

In *Flemming* v. *Tarboro Knitting Mills*, 161 N. C. 435, the master was held liable for an assault by the foreman upon an employee working under him.

Lamb v. *Littman*, 128 N. C. 361, sustained a judgment wherein the injury was caused by the violent handling of the plaintiff by defendant's alter ego, in urging him to the proper performance of his work.

Alabama has given effect to the same principle in *Avondale Mills* v. *Bryant*, 10 Ala. App. 514 and *Jabeles Colias Conf. Co.* v. *Booze*, 181 Ala. 459, as has the Dominion of Canada in *Hudson Bay Co.* v. *Vaillancourt*, 2 Dom. L. R. N. S. 1008.

The Supreme Court of Mississippi has extended the rule to a foreman who assaulted an employee in an attempt to prevent a strike. *Aldin Mills* v. *Pendergraft*, 115 So. Rep. 713.

Furthermore, the very essence of the fellow servant rule is the assumption of risk the employee takes that those with whom he is called upon to work may become careless in the performance of work causing injury to his fellow and such risk is reflected in the compensation he receives for his work.

This is not true with the extraordinary risk of being assaulted or mistreated by one placed in authority over him. His contract of employment, from its very nature, implies a covenant of decent and humane treatment and public policy requires its fulfillment. The days of physical violence, as a means to hurry up work, passed in this country with the institution of slavery and nothing has since occurred in the moral or civil code to revive it.

The determination of the Court of Appeals that its former decision in *Gabrielson* v. *Waydell* was not controlling and that the trial Judge committed no error in denying the defendant's motion to dismiss the complaint upon the ground that plaintiff and his foreman were fellow servants was correct and should be affirmed.

POINT III.

The Court of Appeals did not hold or intimate that the Federal Employers' Liability Act extended the employers liability to a wilful assault of a workman by his foreman.

It is apparent from the opinion of the Court of Appeals that the extent of its decision was, as expressed therein, "Reading *Gabrielson* v. *Waydell* (supra) in the light of the Merchant Marine Act and its history, we do not hesitate to say that the authority of the case as a rule of maritime law has been largely, if not fully spent."

In other words the national policy which led to the abrogation of the fellow servant rule in admiralty, in cases of negligence, is an indication that such rule, if ever applicable in cases of assault, is no longer in accord with such policy and should not be longer observed.

The reference to the Merchant Marine Act and its history, by way of analogy, is not only permissible but eminently appropriate and, to the mind of counsel and of the Court of Appeals, controlling on the question of law submitted for determination.

There is neither rule or reason forbidding the state Courts to refer to the federal statutes and

to the opinions of this Court in deciding questions of law, where the statutes and opinions may be useful in arriving at a conclusion that conforms with the national policies therein contained.

The primary liability of the defendant was found to rest upon the fact that the assault was committed by the foreman within the scope of his employment and in furtherance of the employer's business.

The liability having thus been arrived at, the inquiry turned to whether the employer was immune by reason of the common employment of the foreman and the man subject to his orders.

The Court of Appeals was badly handicapped by its own decision in *Gabrielson* v. *Waydell*.

If this decision remained in consonance with the present concept of the fellow servant rule it was controlling upon the Court of Appeals as it was upon the Appellate Division.

The determination of whether it was still controlling was necessarily approached as a question of maritime law.

It was recognized that the maritime law of the United States is what Congress and this Court declare it to be.

By reference to what Congress has done and this Court has said with regard to the fellow servant rule in cases of negligence within federal control, we could by analogy, readily conclude whether the rule, antiquated as it is and expressly abrogated in cases where it had originally prevailed, should now be extended to a situation where its application, in any event, is gravely doubted and where authority against it is overwhelming both in the state and federal Courts.

The Court of Appeals, no less reluctant to violate the time honored, if somewhat discredited, doctrine of *stare decisis* than other Courts of its dignity and prestige said:

> "Long and firmly established doctrines are not so easily disposed of, although the authority of recent cases of first impression has at times been disregarded in order to conform the decisions of the Court to the actualities of industrial and business life."

The Court then proceeds in its reference to the Merchant Marine Act and its history.

It does not attempt, in the slightest degree, to extend the scope of that Act to cases of assault.

Clinging, however, to its own statement of the fellow servant rule, in *Gabrielson* v. *Waydell,* it says:

> "The fellow servant rule is generally stated in terms of negligence only, although misconduct of a co-employee is also within its scope."

In reference to the Employers Liability Act it says:

> "That act, wherever applicable, read literally, imposes liability on the employer for the acts of a fellow servant only in cases of personal injury to an employee resulting from negligence. Misconduct is not in terms included."

The N. Y. Employers Liability Law of 1921 is also referred to. That Act, as the Court says, "applies to the vice-principal rule only to cases of negligence."

Would anyone have the hardihood to contend that such reference by the Court would extend the N. Y. Employers Liability Law to cases of assault?

If not in the latter case, why in the former?

It is respectfully submitted that the question before this Court, is, solely, whether the fellow servant rule applies as between a foreman and an employee subject to his orders when the former assaults the latter within the scope of the employment and in the interest of the business in which both are engaged and not whether the Federal Employers Liability Act extends to cases of assault or other misconduct.

POINT IV.

The petitioners, under the facts of the case and the determination of the Court of Appeals, were not denied any right, privilege or immunity claimed or set up under the Laws of the United States.

Petitioners *were* denied the protection of the fellow servant rule in a case where a foreman within the scope of his employment and in furtherance of the master's business assaulted another employee who was subject to his orders.

If the assault had been made, within the scope of employment and in the interest of the business, upon a third party, the liability would have been apparent. *Phila. & R. R. Co.* v. *Denby,* supra, *Denver & Rio Grande Ry.* v. *Harris,* supra.

Petitioners present no authority and make no argument showing a difference in the rule when

the assaulted party is a fellow employee and when he is what might be termed a third party.

It is a fair implication that such authority does not exist except in *Gabrielson* v. *Waydell,* supra and the one or two expressions of minor Courts referred to by Judge Swan in *Alpha S. S. Co.* v. *Cain* now before this Court for review. The authority to the contrary, as hereinbefore set forth, is substantial.

A principle decided by this Court in *Union Pacific R. R. Co.* v. *Fort,* 17 Wall 553 seems to fairly exclude the application of the fellow servant rule in all cases of misconduct, especially upon the part of a servant placed over another.

On pages 557-558 the Court says:

> "This rule (fellow servant) proceeds on the theory that the employee in entering the service of the principal is presumed to take upon himself the risk incident to the undertaking, among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the persons placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligation arising out of the contract of service, and withdraw all

protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and cannot receive our sanction."

This decision is in line with the case of *Farwell* v. *Boston etc. R. R. Corp.*, 4 Metc. 49, accredited as the leading case in the United States on the adoption of the fellow servant doctrine and the reasons therefor.

In that case it is said:

"We are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are the perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others."

Misconduct is not within the category of negligence or carelessness, is not "foreseen and provided for in the rate of compensation" and, as a logical conclusion, is not within the doctrine.

The *Farwell* case, as all the other cases, instrumental in introducing the fellow servant rule "into the common law within less than a century," recognized public policy as the true basis of the doctrine.

That policy Congress has seen proper to change "to establish a better rule of conduct and give place to a higher degree of justice," as said by the Court of Appeals.

Such change of policy may not be, and is not, confined alone to cases wherein its applicability is unquestioned but extends, as well, to those wherein its applicability is in doubt.

This Court, called upon for the first time, to determine whether the rule has heretofore been or is now applicable in cases of assault, should give due effect to the policy established by its abrogation in cases of negligence.

Should the court determine that the fellow-servant rule, under maritime law, has no application, in a situation such as is here presented, the petitioners have not been denied any right, privilege or immunity claimed or set up under the Laws of United States and the writ should not be sustained.

CONCLUSION.

The judgment of the Supreme Court entered in pursuance of the order of the Court of Appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 390.—October Term, 1929.

Inez M. Jamison, William N. Dykman, and Martin E. Goetzinger, Executrix and Executors of William A. Jamison, Deceased, Petitioners, *vs.* Valentin Encarnacion.

On Writ of Certiorari to the Supreme Court of the State of New York.

[May 26, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

This is an action brought in the Supreme Court of New York by respondent, a longshoreman, against William A. Jamison, an employing stevedore, to recover damages for personal injuries. Plaintiff was employed by defendant as a member of a crew loading a barge lying at Brooklyn in the navigable waters of the United States. One Curren was the foreman in charge of the crew. While plaintiff was upon the barge engaged with others in loading it, the foreman struck and seriously injured him.

The evidence showed that the foreman was authorized by the employer to direct the crew and to keep them at work. Plaintiff's evidence was sufficient to warrant a finding that the foreman assaulted him without provocation and to hurry him about the work. The trial judge instructed the jury that the defendant would not be liable if the foreman assaulted plaintiff by reason of a personal difference but that, if the foreman in the course of his employment committed an unprovoked assault upon plaintiff in furtherance of defendant's work plaintiff might recover. The jury returned a verdict for $2,500 in favor of plaintiff and the court gave him judgment for that amount.

The case was taken to the Appellate Division and there plaintiff invoked in support of the judgment § 33 of the Merchant Marine Act, 1920, 46 U. S. C., § 688, and the Federal Employers' Liability Act of April 22, 1908, 45 U. S. C., §§ 51-59. The court, 224 App.

Div. 200, held that plaintiff's injury was not the result of any negligence within the meaning of the latter Act and reversed the judgment.

The Court of Appeals, 251 N. Y. 218, held that the Federal Employers' Liability Act applies and, after quoting the language of this court in *Internat. Stevedore Co.* v. *Haverty*, 272 U. S. 50, 52, said (p. 223): "As the word 'seamen' in the act [§ 33, Merchant Marine Act] includes 'stevedores', so the word 'negligence' [§ 1, Federal Employers' Liability Act] should . . . include 'misconduct' ". It reversed the judgment of the Appellate Division and affirmed that of the Supreme Court.

Section 33 of the Merchant Marine Act provides:

> "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . ".

Section 1 of the Federal Employers' Liability Act provides:

> "That every common carrier by railroad while engaging in [interstate] commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ."

Plaintiff was a seaman within the meaning of § 33 (*Internat. Stevedore Co.* v. *Haverty, supra*) and, as he sustained the injuries complained of while loading a vessel in navigable waters, the case is governed by the maritime law as modified by the Acts of Congress above referred to. *Northern Coal Co.* v. *Strand*, 278 U. S. 142. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375. He is entitled to recover if within the meaning of § 1 his injuries resulted from the negligence of the foreman.

The question is whether "negligence" as there used includes the assault in question. The measure was adopted for the relief of a large class of persons employed in hazardous work in the service described. It abrogates the common law rule that makes every employee bear the risk of injury or death through the fault or negligence of fellow servants and applies the principle of respondeat superior (§ 1), eliminates the defense of contributory negligence

and substitutes a rule of comparative negligence (§ 3), abolishes the defense of assumption of risk where the violation of a statute enacted for the safety of employees is a contributing cause (§ 4) and denounces all contracts, rules and regulations calculated to exempt the employer from liability created by the Act. § 5.

The reports of the House and Senate committees having the bill in charge condemn the fellow-servant rule as operating unjustly when applied to modern conditions in actions against carriers to recover damages for injury or death of their employees and show that a complete abrogation of that rule was intended.[1] The Act, like an earlier similar one that was held invalid because it included subjects beyond the reach of Congress,[2] is intended to stimulate carriers to greater diligence for the safety of their employees and of the persons and property of their patrons. *Second Employers' Liability Cases*, 223 U. S. 1, 51. *Minneapolis &c. R. Co.* v. *Rock*, 279 U. S. 410, 413.

The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 17-18. *Gooch* v. *Oregon Short Line R. R. Co.*, 258 U. S. 22, 24. *Barrett* v. *Van Pelt*, 268 U. S. 85, 90. *Johnson* v. *United States*, 163 Fed. 30, 32. Cf. *Hackfeld & Co.* v. *United States*, 197 U. S. 442, 449, *et seq.* The Act is not to be narrowed by refined reasoning or for the sake of giving "negligence" a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted and to that end the word may be read to include all the meanings given to it by courts and within the word as ordinarily used. *Miller* v. *Robertson*, 266 U. S. 243, 248, 250.

As the Federal Employers' Liability Act does not create liability without fault (*Seaboard Air Line* v. *Horton*, 233 U. S. 492, 501), it may reasonably be construed in contrast with proposals and enactments to make employers liable, in the absence of any tortious act, for the payment of compensation for personal injuries or death of employees arising in the course of their employment.

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[1]Senate Report No. 460, pp. 1-2, 60th Congress, 1st Session. House of Representatives Report No. 1386, p. 2, 60th Congress, 1st Session.

[2]Act of June 11, 1906, 34 Stat. 232, held unconstitutional in The Employers' Liability Cases, 207 U. S. 463.

"Negligence" is a word of broad significance and may not readily be defined with accuracy. Courts usually refrain from attempts comprehensively to state its meaning. While liability arises when one suffers injury as the result of any breach of duty owed him by another chargeable with knowledge of the probable result of his conduct, actionable negligence is often deemed—and we need not pause to consider whether rightly—to include other elements. Some courts call willful misconduct evincing intention or willingness to cause injury to another gross negligence. *Bolin* v. *Chicago &c. Railway Co.*, 108 Wis. 333, and cases cited. And see *Peoria Bridge Association* v. *Loomis*, 20 Ill. 235, 251. *C., R. I. & P. Ry. Co.* v. *Hamler*, 215 Ill. 525, and cases cited. *Mercer* v. *Corbin*, 117 Ind. 450. And it has been held that the use of excessive force causing injury to an employee by the superintendent of a factory in order to induce her to remain at work was not a trespass as distinguished from a careless or negligent act. *Richard* v. *Company*, 79 N. H. 380, 381. While the assault of which plaintiff complains was in excess of the authority conferred by the employer upon the foreman, it was committed in the course of the discharge of his duties and in furtherance of the work of the employer's business. As unquestionably the employer would be liable if plaintiff's injuries had been caused by mere inadvertence or carelessness on the part of the offending foreman, it would be unreasonable and in conflict with the purpose of Congress to hold that the assault, a much graver breach of duty, was not negligence within the meaning of the Act. *Johnson* v. *Southern Pacific Co.*, *supra*. *Schlemmer* v. *Buffalo, Rochester, &c. Ry.*, 205 U. S. 1, 9, 10.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.